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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 567

THE UNITED STATES OF AMERICA, APPELLANT

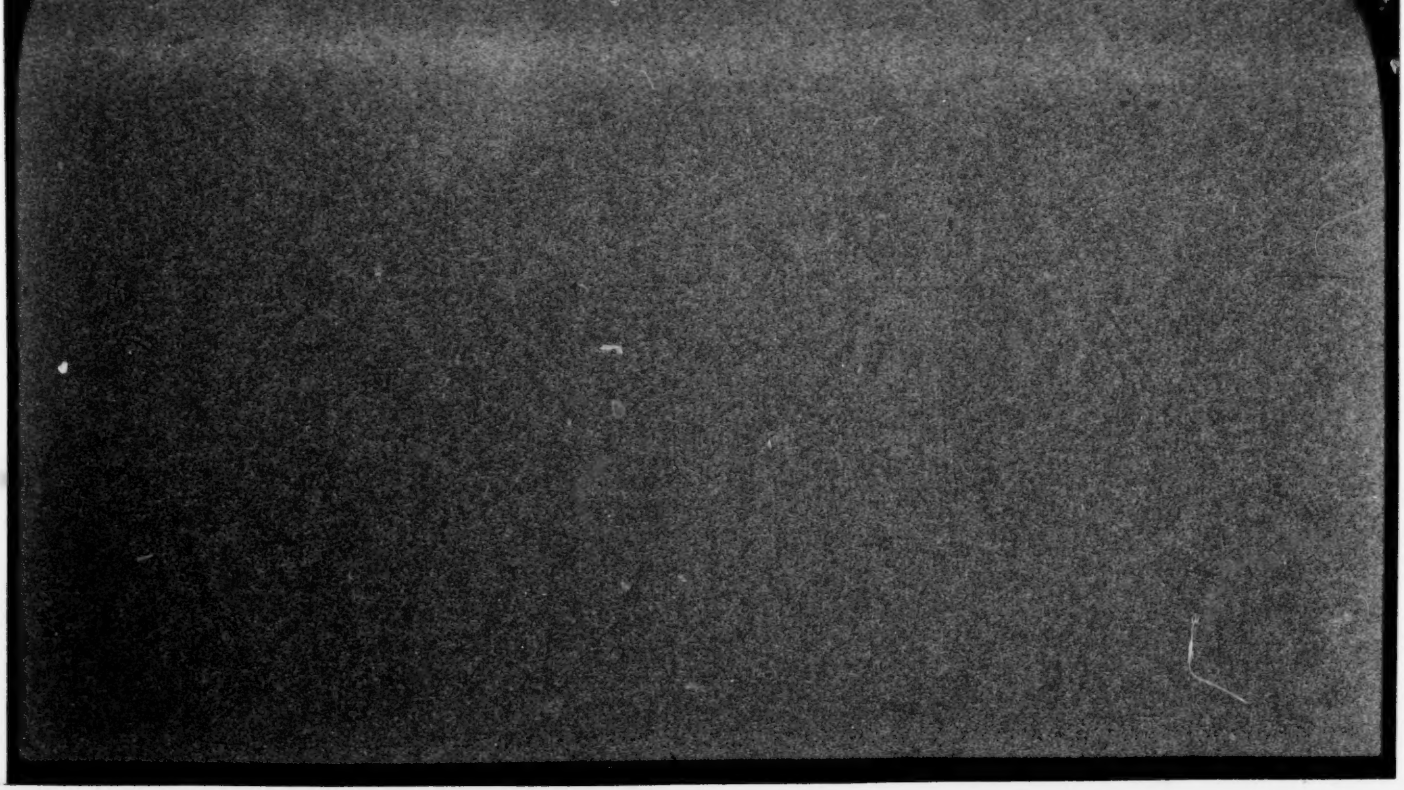
vs.

SANTOS FLORES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED DECEMBER 24, 1932

(37264)



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1 In United States District Court for the Eastern District of Pennsylvania

No. 4932, June term 1931

THE UNITED STATES
vs.
SANTOS FLORES

Edward W. Wells; J. V. Lovitt.

Docket entries

Sept. 10, 1931.	True bill.
Feb. 3, 1932.	Demurrer to indictment filed.
" 3, "	Stipulation of counsel as to certain facts filed.
" 3, "	Appearance of J. V. Lovitt, Esq., for defendant filed.
Mar. 2, 1932.	Argued sur demurrer.
" 4, "	Opinion, Dickinson, J., sustaining demurrer and discharging defendant without day, filed.
" 7, "	Order of court directing further argument on demurrer all proceedings to stay, etc., filed.
Oct. 26, 1932.	Re-argument sur demurrer.
Nov. 7, 1932.	Opinion, Dickinson, J., denying motion for reargument, filed.
" 7, "	Order of court sustaining demurrer to indictment, discharging defendant without day, exception thereto by plaintiff, and order allowing exception, filed.
" 16, "	Copy of certificate of judge filed.
Dec. 2, 1932.	Certificate that jurisdictional question is involved filed.
" 2, "	Assignments of error filed.
" 2, "	Petition for appeal and order of court allowing appeal filed.
Dec. 2, 1932.	Citation allowed and issued.
2 " 2, "	Statement of jurisdiction filed.
" 2, "	Service of copies of petition for appeal, order allowing appeal, assignments of error, and statementas to jurisdiction, and acknowledgement of service thereof, filed.
Dec. 2, 1932.	Citation returned, "service accepted" and filed.
" 7, "	Præcipe for transcript of record sur appeal filed.

3 In United States District Court

[Title omitted.]

Indictment

Filed Sept. 10, 1931

The grand inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their respective oaths and affirmations, respectfully do present that heretofore, to wit, on or about February 3rd, 1930, one Santos Flores, a subject of the United States of America, with force and arms, and by stabbing in the neck with a deadly weapon, to wit, a knife, and by other wounds and injuries, all wilfully, deliberately and feloniously done and committed by him, the said Santos Flores, did so
4 injure, assault, and mortally wound John Woolford, a citizen of the United States of America, all with premeditation, deliberation, and of malice aforethought in him, the said Santos Flores, that, as a direct and sole result of said felonious assault, mortal wounds, and injuries, he, the said John Woolford, at the place and within the jurisdiction hereinafter set forth, died, on February 4, 1930; all of which felonious assaults, injuries, stabbings, and mortal wounds were done and given by him, the said Santos Flores, to and upon the body of him, the said John Woolford, and the death of him, the said John Woolford, occurred within the admiralty and maritime jurisdiction of the United States of America and within the jurisdiction of this honorable court, to wit, in and on board a certain American vessel, to wit, the S. S. "Padnsay," a vessel then and there owned and operated by a citizen of the United States of America, while said vessel was within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State of said United States of America, to wit, during the time, February 3, 1930,
5 and February 4, 1930, when said vessel was at anchor in the harbor or port of Matadi, a port in Belgian Congo, which then and there was under and subject to the sovereignty of the Kingdom of Belgium; and he, the said Santos Flores, after the commission of said crime was first brought into the port of Philadelphia, which is within the Eastern District of Pennsylvania and within the jurisdiction of this court.

And so, the grand inquest aforesaid, upon their respective oaths and affirmations aforesaid, do present that he, the said Santos Flores, in manner and form aforesaid, feloniously, willfully, deliberately, with premeditation and of his malice aforethought, did kill and murder him, the said John Woolford, all at the time and within the jurisdiction aforesaid.

Contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

(s) EDWARD W. WELLS,
United States Attorney.

PHILADELPHIA, PA., *9th September, 1931.*

6 [Endorsed]

No. 4932, June sess., 1931.

District Court, United States, Eastern District of Penna.

The United States of America *vs.* Santos Flores

TRUE BILL

(s) PAUL BROOKS,
Foreman.

INDICTMENT

Murder.

WITNESSES

J. P. McCarthy.
Candido Ferreira, M. D.

Sec. 273, act 3-4-09.
35 Stat., pt. 1, p. 1088.

In United States District Court

[Title omitted.]

Demurrer to indictment

Filed Feb. 3, 1932

And now, to wit, Feb. 3, 1932, comes Santos Flores, the defendant, by his attorney, John V. Lovitt, esquire, and demurs to the indictment filed and assigns therefor the following reasons:

1. That the indictment charges no offense against the laws of the United States of America.

2. That the indictment shows on its face that the crime charged did not occur within the admiralty and maritime jurisdiction of the United States of America.

3. That this honorable court has no jurisdiction of the matters charged in the indictment.

(s) JOHN V. LOVITT,
Attorney for Defendant.

In United States District Court

[Title omitted.]

Stipulation of counsel as to certain facts

Filed Feb. 3, 1932

The following facts are hereby stipulated between counsel for the United States of America and counsel for the defendant, Santos Flores, so that the same are admitted with the force and effect as if a motion for a bill of particulars had been filed by the defendant, allowed by the court, and duly answered by United States of America:

1. The S. S. "Padsnay" at the time of the offense charged in the indictment was attached to the shore at the port of Matadi by means of cables and was unloading cargo by means of a cable and sling.

2. The port of Matadi is located on the Congo River approximately 250 miles inland from the mouth of said river. The said port is in the Belgian Congo, which then and there was under and subject to the sovereignty of the Kingdom of Belgium.

9 3. The S. S. "Padsnay" is registered under the laws and flew the flag of the United States of America and at all times reievent to the offense charged in the indictment was owned and operated by citizens of the United States of America.

4. John Woolford, the deceased, was at the time of his death a citizen of United States of America as was and is Santos Flores, the defendant.

5. The defendant, after commission of the alleged crime, was returned to the United States of America at Philadelphia, where he was delivered to the United States marshal.

(s) EDWARD W. WELLS,
United States Attorney,
Attorney for Complainant.

(s) JOHN V. LOVITT,
Attorney for Defendant.

Dated, February 3, 1932.

10 In United States District Court

[Title omitted.]

Opinion sur demurrer to indictment

Filed March 4, 1932

DICKINSON, J.:

The question discussed in this case would be a very interesting one if it had not been set at rest by the Circuit Court of Appeals for the

Third Circuit in the case of United States vs. Maro, 27 F. R. (2nd) 518. A procedural difficulty might be thought to intervene in that the question discussed is sought to be raised by demurrer. All desire, however, the real point made to be met regardless of mere formalities. There has, moreover, been a compliance with these, forasmuch as the defendant had the right to a bill of particulars, which has been furnished in the form of a stipulation of the fact, situation out of which the law asked to be ruled arises, and a bill of particulars when furnished becomes part of the bill of indictment. If a bill of indictment charges no criminal offense of which the court can take judicial cognizance, such question can be raised by demurrer. This
11 preliminary question being thus out of the way we face the real question raised. The indictment charges that the defendant, a citizen of the United States, was on board and one of the crew of an American ship at the time in a port under the jurisdiction of the King of Belgium in the inland waters of a river 250 miles from the sea and moored to a wharf erected on the land from which the ship was taking on her cargo, and that the defendant then and there assaulted and caused the death of a shipmate, who was also a citizen of the United States and a member of the same crew. This killing, the indictment further charges, was a felonious homicide denounced by and under the laws of the United States as a crime committed against its "peace and dignity." We may premise that the indictment does not charge, nor can this court try, the defendant for an offense against the laws of the Kingdom of Belgium, the laws of Pennsylvania, or for any offense other than one denounced by an act of Congress as a crime. The question thus becomes whether any act of Congress or law of the United States has conferred upon this court the judicial power to try him. The question has been discussed pro and con with great ability and with a commendable display of frankness and fairness. Where are we to look for a grant of the power in question? The United States attorney makes a very broad answer to this question by pointing to the commerce clause of the Constitution and to the grant of judicial power in cases of "admiralty and maritime jurisdiction." It is worthy of comment that the enumerated powers granted to Congress by section 8 of Article I include no reference to admiralty or maritime matters except in the power "to define and punish piracy, felonies committed
12 on the high seas and offenses against the laws of nations" and the power "to regulate captures on land and water," with the references to the Navy. The only direct reference to admiralty and maritime law is that in section 2 of Article III providing that the judicial power shall extend to this subject. We are unable to see that the law maritime has any bearing upon the subject under discussion, as admiralty courts are not, and under our Constitution can not be, courts of criminal jurisdiction. It is only by indirection and secondarily that admiralty jurisdiction enters into the question

before us, as when our act of Congress in defining a crime limits it to acts committed in places within the admiralty and maritime jurisdiction of the United States. Then, of course, resort must be had to the law maritime to identify such places. Beyond all question this ship, her master and crew were subjects of this law for whatever hearing this may have. Under the system of the administration of criminal justice in the United States, as distinguished from the several States, two things are required. Congress must have the constitutional power to legislate and it must have exercised the power by the passage of a law. There are no crimes against the United States other than statutory offenses. This distinction is of no present importance, because the Constitution grants to Congress the power "to define and punish * * * felonies committed on the high seas," and the present Criminal Code follows the phraseology of the Constitution, so that whatever one means the other means. The law we now have is a recurrence to the original act of 1790 and almost a reproduction of its phraseology. It is true that in 1825 an act was passed which went much beyond the law as we now have it. The reason given for the change of phrase-
13 ology was that there were a number of acts of varying phraseology and it was thought to be desirable to bring them all into uniformity. Another reason may have been to bring the statute law into undoubted conformity with the Constitution. Whatever the motive may have been the change was in fact made and the offense defined has as an ingredient the element that it was "committed on the high seas." We fail to see the bearing of the act of 1825 other than as informative and illustrative. The opinion of Attorney General Cushing expressed in 1856 (which, it is to be noted, was after the repeal of the act of 1825) confirms the view that an act to be a crime must have been committed on the "high seas." The high professional reputation of this distinguished official gives to his utterance the voice of authority. In the reading of the cases the distinction must be kept in mind between the "waters" which are within the territorial domain of the United States, and which may or may not be within the limits of one of our States, and waters which give the courts of admiralty maritime jurisdiction. There is no need to rule on the question of whether Congress has the constitutional power to denounce as a crime an act not committed on the "high seas," because the present Criminal Code makes no such attempt. The sole question is whether a vessel moored to a wharf 250 miles inland taking on or discharging her cargo is on the "high seas." The Circuit Court of Appeals for this circuit has decided this question for us and by this ruling we are bound.

Demurrer sustained and defendant discharged without day.

4 In United States District Court

[Title omitted.]

Order and decree granting further argument sur demurrer

Filed March 7, 1932

And now, to wit, this seventh day of March, A. D. 1932, on motion f Edward W. Wells, United States attorney, the court order and ecree that further argument be had in the above-captioned case on efendant's demurrer to the indictment; all proceedings to stay in he meanwhile and the court's order overruling the demurrer and ischarging the defendant sine die stayed pending the further order f the court.

By the court.

(s) DICKINSON, *J.*

5 In United States District Court

[Title omitted.]

)pinion in re demurrer to indictment sur motion for reargument

Filed Nov. 7, 1932

)ICKINSON, J.:

When this case was argued and ruled, it was upon the question f whether a vessel tied to a dock extending into a navigable stream, t a place miles above its mouth and far above any taint of salt ater, was at the time on the "high seas."

On the authority of U. S. vs. Maro, 21 (2nd) Fed. Rep. 533, af- rmed in 27 (2nd) Fed. Rep. 518, we ruled the question in the nega- ive. This meant that the demurrer interposed should be sustained nd the defendant discharged. We are asked to review this ruling, ecause while the Maro case is on all fours with this in its fact eatures, it differs in that in this case the indictment avers the offense f murder committed on an American vessel out of the jurisdiction f any State but within the admiralty and maritime jurisdiction of he courts of the United States, while the Maro case was argued and uled as a case of murder committed on the high seas. The United tates, we are told, accepted the ruling in the Maro case because it did not care to further stand for the proposition that a vessel 6 hundreds of miles from salt water was yet on the high seas.

Care was taken in consequence in this case to indict the de- endant not for a murder committed on the high seas but for a urder committed on an American vessel, out of the jurisdiction of ny State but within the maritime jurisdiction of the courts of the nited States. The distinction made is clear enough, but it takes s into the realm of constitutional law and raises as well many and

delicate questions of international relations, if not of international law.

Into these very interesting questions we see no need to go. It is agreed that this case and the Maro case are alike in their facts. The Maro case arose on habeas corpus. The defendant was open to indictment for any offense which arose out of the facts. He might in consequence have been indicted for the offense charged in this indictment. The Circuit Court of Appeals affirmed a judgment which discharged him without day. We must from this conclude that as he might have been indicted for the offense here charged, such an indictment could not be sustained. It follows that this indictment can not be sustained. We feel bound by the Maro case to so rule.

Motion for reargument denied.

17 In United States District Court for the Eastern District of Pennsylvania

No. 4932

UNITED STATES OF AMERICA

vs.

SANTOS FLORES

Order sustaining demurrer

Filed Nov. 7, 1932

And now, to wit, this 7th day of November, 1932, it is ordered that the demurrer to the indictment in the above-captioned matter be, and the same is hereby, sustained, and the defendant discharged without day; to which the plaintiff excepts and the exception is allowed.

By the court.

(S) DICKINSON, *J.*

18 In United States District Court

[Title omitted.]

Certificate as to statute construed

Filed Dec. 2, 1932

And now, to wit, the 16th day of November, A. D. 1932, the court hereby certify that the opinion rendered in the above-entitled case by this court on the third day of March, A. D. 1932, and the subsequent opinion thereto rendered on November 7, 1932, denying

motion for re-argument, were founded upon the court's construction of section 272 of the U. S. Criminal Code, approved March 4, 1909, 35 Stat. 1142, which is as follows:

"The crimes and offenses defined in this chapter shall be punished as herein prescribed:

"First. When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or
19 when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territor*ity*, or District thereof."

By the court.

(S) DICKINSON, *J.*

20 In United States District Court

[Title omitted.]

Petition for appeal

Filed Dec. 2, 1932

Comes now the United States of America, plaintiff in the above-entitled cause, by Edward W. Wells, United States attorney in and for the Eastern District of Pennsylvania, and conceiving itself aggrieved by the order entered in this cause on November 7, 1932, sustaining a demurrer to the indictment, prays that an appeal may be allowed from said order to the Supreme Court of the United States, and in connection with this petition the United States presents herewith its assignment of errors and statement of jurisdiction.

Dated, December 1, 1932.

UNITED STATES OF AMERICA,
By its attorney,
(s) EDWARD W. WELLS,
United States Attorney.

In United States District Court

Order allowing appeal

Filed Dec. 2, 1932

Appeal allowed this 2nd day of December, 1932.

(s) OLIVER B. DICKINSON,
United States District Judge.

21 In United States District Court

[Title omitted.]

Assignment of errors

Eiled Dec. 2, 1932

Comes now the United States of America, by Edward W. Wells, United States attorney in and for the Eastern District of Pennsylvania, and in connection with its appeal makes the following assignment of errors:

1. The District Court erred in sustaining the demurrer to the indictment.

2. The District Court erred in construing the following language.

"The crimes and offenses defined in this chapter shall be punished as herein prescribed:

"First. When committed * * * within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof,"

as used in section 272 of the Criminal Code, as applying only to such offenses when committed upon the high seas.

3. The District Court erred in holding that the crime of murder, committed upon a registered vessel of the United States, owned by citizens of the United States, when lying in a river within the territorial jurisdiction of a foreign sovereign, is not within the admiralty and maritime jurisdiction of the United States.

22 4. The District Court erred in holding that it had no jurisdiction to try the defendant for a murder committed on a registered vessel of the United States, owned by citizens of the United States, when lying in a river within the territorial jurisdiction of a foreign sovereign, on the ground that section 272, Criminal Code, has no application to such offenses.

Dated, December 1, 1932.

THE UNITED STATES OF AMERICA,
By its attorney,
(s) EDWARD W. WELLS,
United States Attorney.

23 [Citation in usual form, showing service on John V. Lovitt, filed Dec. 2, 1932, omitted in printing.]

24 In United States District Court

[Title omitted.]

Præcipe for transcript of record

Filed Dec. 7, 1932

To the CLERK,
U. S. District Court, Phila., Pa.:

In making up the record in the above-entitled case, kindly include the following papers and no others:

Docket entries.
Indictment.
Demurrer to indictment.
Stipulation of counsel as to certain facts.
Opinions, Dickinson, J., sustaining demurrer and discharging defendant without day.
Order of court directing further argument on demurrer, all proceedings to stay meanwhile.
Order of court sustaining demurrer, etc.
Certificate that jurisdictional question is involved.
Assignments of error.
Petition for appeal and order allowing same.
Citation.
Clerk's certificate.

(s) EDWARD W. WELLS,
United States Attorney.

25 [Clerk's certificate to foregoing transcript omitted in printing.]

26 In Supreme Court of the United States

Statement of points upon which appellant will rely, and designation of entire record for printing

Filed Dec. 28, 1932

Pursuant to rule 13 of this court, appellant specifies the following as the points upon which it intends to rely in the above-entitled cause:

1. The District Court erred in construing that portion of section 272 of the Criminal Code which provides that "The crimes and offenses defined in this chapter shall be punished as herein prescribed: First. When committed * * * within the admiralty and maritime jurisdiction of the United States and out of the juris-

diction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof,"
27 as applying only to such offenses when committed upon the high seas.

2. The District Court erred in holding that the crime of murder, committed upon a registered vessel of the United States, owned by citizens of the United States, when lying in a river within the territorial jurisdiction of a foreign sovereign, is not within the admiralty and maritime jurisdiction of the United States.

3. The District Court erred in holding that it had no jurisdiction to try the defendant for a murder committed on a registered vessel of the United States, owned by citizens of the United States, when lying in a river within the territorial jurisdiction of a foreign sovereign, on the ground that section 272, Criminal Code, has no application to such offenses.

4. The District Court erred in sustaining the demurrer to the indictment.

The appellant deems the entire record, as filed, to be necessary for the consideration of the above contentions.

THOMAS D. THACHER,
Solicitor General.

DECEMBER 28, 1932.

[File endorsement omitted.]

[Endorsement on cover:] Enter, Attorney General. File No. 37264. E. Pennsylvania, D. C. U. S. Term No. 567. The United States of America, appellant, vs. Santos Flores. Filed December 23, 1932. File No. 37264.

U. S. GOVERNMENT PRINTING OFFICE: 1933

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 567

THE UNITED STATES, APPELLANT

v.

SANTOS FLORES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATEMENT OF JURISDICTION

In compliance with Rule 12 of this Court, appellant submits herewith its statement showing the basis of the jurisdiction of this Court to entertain the appeal in the above-entitled cause:

A

STATUTES

The statutory jurisdiction of this Court to review by direct appeal the order here complained of is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), otherwise known as the Criminal Appeals Act, and by

Section 238 of the Judicial Code as amended by the Act of February 13, 1925.

B

DATES OF ORDER AND APPLICATION FOR APPEAL

The order of the District Court was entered November 7, 1932. (R. 17.)[1] An application for appeal was filed December 2, 1932, and allowed December 2, 1932. (R. 20.)

C

NATURE OF THE CASE

The indictment, consisting of one count, was based upon Sections 272, 273, and 275 of the Criminal Code (U. S. C., Title 18, Sections 451, 452, and 454), and charges a murder committed upon an American vessel anchored in the harbor of Matadi, Belgian Congo. (R. 3.) A demurrer was sustained on the ground that a vessel moored to an inland wharf was not on the high seas, and hence not within the jurisdiction of any United States District Court. (R. 7, 10, 15, 17.)

D

CASES SUSTAINING JURISDICTION

The following decisions are believed to sustain the jurisdiction of this Court, whether the order

[1]All references to the record are to the pages of the certified unprinted record prepared by the clerk of the District Court and on file with the clerk of this Court. The record has not yet been printed.

appealed from be deemed to have been entered as upon demurrer or as upon a special plea in bar:

United States v. *Thompson*, 251 U. S. 407, 412.

United States v. *Ramsey*, 271 U. S. 467.

United States v. *Goldman*, 277 U. S. 229, 236.

United States v. *Unzeuta*, 281 U. S. 138.

United States v. *Sprague*, 282 U. S. 716.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

DECEMBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

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Andrews, Guide to Materials for American History, Vol. 2, 305, 306 11, 13
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Benedict on Admiralty, 5th ed., 705, 706, 743, 748, 774, 792, 811 11, 12, 14
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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 567

THE UNITED STATES OF AMERICA, APPELLANT

v.

SANTOS FLORES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the District Court (R. 4–8) have not been reported.

JURISDICTION

The judgment to be reviewed was entered on November 7, 1932. (R. 8.) Appeal to this Court was allowed on December 2, 1932. (R. 9.) The jurisdiction of this Court to review by direct appeal the judgment involved is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18,

sec. 682) and Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, sec. 345). The District Court certified that its decision was founded upon its construction of a section of the United States Criminal Code. (R. 8.)

The indictment (R. 2) was filed in the District into which the accused was first brought after the commission of the offense, in accordance with Section 41 of the Judicial Code. (U. S. C., Title 28, sec. 102.)

QUESTION PRESENTED

The appellee was indicted for a murder committed on board a vessel anchored in a river within the territorial jurisdiction of a foreign sovereign. The accused and the deceased were American citizens and the vessel was of American registry, owned and operated by citizens of the United States. Was such a murder within the admiralty and maritime jurisdiction of the United States within the meaning of the Constitution and the Criminal Code?

PROVISIONS OF CONSTITUTION AND OF STATUTE INVOLVED

Article III, section 2 of the Constitution, provides:

> The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction. * * *

The Criminal Code, Act of March 4, 1909, c. 321, sec. 272, 35 Stat. 1088, 1142 (U. S. C., Title 18, sec. 451) provides:

> The crimes and offenses defined in this chapter shall be punished as herein prescribed:
>
> First. When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof. * * *

Sections 273 and 275 of the Criminal Code (U. S. C., Title 18, secs. 452, 454) define murder and fix its punishment.

STATEMENT

The appellee was indicted (R. 2) in the District Court of the United States for the Eastern District of Pennsylvania on the charge that he, an American citizen, had murdered another American citizen, by stabbing, on board an American vessel, then owned and operated by an American citizen, when that vessel was anchored in the harbor of Matadi, a port in the Belgian Congo, which was

subject to the sovereignty of the Kingdom of Belgium.

It was alleged that at the time of the murder the vessel was within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State of the United States and that the appellee was first brought into the port of Philadelphia, which is within the Eastern District of Pennsylvania.

Stipulations of counsel (R. 4) set forth more clearly the location of the boat and showed its American registry and the American citizenship of the accused and of the deceased.

The accused (R. 3) demurred to the indictment upon the ground that the crime charged did not occur within the admiralty and maritime jurisdiction of the United States.

The District Court sustained the demurrer (R. 4), basing its decision upon its construction of section 272 of the Criminal Code and holding that the crime charged in the indictment was not within the jurisdiction of the court as defined in the statute. A motion for reargument was denied (R. 7), the court holding that its decision was controlled by *United States ex rel. Maro* v. *Mathues,* 21 F. (2d) 533, affirmed in *Mathues* v. *United States ex rel. Maro,* 27 F. (2d) 518 (C. C. A. 3d). The indictment in that case charged that a crime committed in a foreign port was committed on the high seas, an inconsistency of statement not found in the pres-

ent indictment. The Government thereupon took this appeal from the order sustaining the demurrer.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

(1) In deciding that section 272 of the Criminal Code applies only to offenses committed on the high seas.

(2) In holding that murder committed upon a registered vessel of the United States, owned by citizens of the United States, when lying in a river within the territorial jurisdiction of a foreign sovereign, is not within the admiralty and maritime jurisdiction of the United States.

(3) In sustaining the demurrer to the indictment.

SUMMARY OF ARGUMENT

The offense charged was within the admiralty and maritime jurisdiction as that phrase is used in the Constitution and in the statutes.

The power of Congress to enact the law does not rest upon its power under Article I, section 8, clause 10, of the Constitution, "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." It rests upon another grant of power, different in its origin and broader in its scope, to regulate all matters within the admiralty and maritime jurisdiction, a power necessarily implied in Article III, section 2, clause 1.

The admiralty and maritime jurisdiction extends to criminal offenses of all grades, and Congress may define such offenses.

In the exercise of this power the statute carefully excludes from the jurisdiction of the District Courts offenses committed within the territorial jurisdiction of any State of the United States, but subject to this limitation expressly authorizes trial for named offenses, including murder, when committed (1) upon the high seas, (2) upon waters within the admiralty and maritime jurisdiction of the United States, and (3) on board any vessel belonging to any citizen of the United States if the offense is committed within the admiralty and maritime jurisdiction of the United States. The admiralty and maritime jurisdiction of the United States extends beyond its territorial waters to the high seas, and beyond the high seas to offenses committed on board American vessels in navigable waters within the territorial jurisdiction of other nations. The offense charged was within the admiralty and maritime jurisdiction of the United States, was not within the jurisdiction of any of the States, and was therefore within the jurisdiction of the court below, as defined by this statute.

Jurisdiction of one nation over offenses committed on board its vessels while lying in the ports of another nation is well recognized under the Law of Nations.

ARGUMENT

Two provisions of the Constitution are devoted to maritime affairs. Article I, sec. 8, cl. 10, empowers Congress to define and punish piracies and felonies committed on the high seas. Article III, sec. 2, provides that the judicial power shall extend to all cases of admiralty and maritime jurisdiction.

In this case we are not concerned with piracy or any felony on the high seas, and if Congress is without power to define and punish any crimes within its admiralty and maritime jurisdiction other than those referred to in clause 10 of sec. 8 of Article I the judgment of the court below was right. But if, as we contend, Congress has power under sec. 2 of Article III to define and punish all crimes within the admiralty and maritime jurisdiction of the United States, then the judgment below was wrong unless crimes committed upon American vessels within a foreign port are not within the maritime and admiralty jurisdiction of the United States.

The clause relating to felonies on the high seas had its origin in the Articles of Confederation, which, by Article IX, provided that—

> The United States in Congress assembled, shall have the sole and exclusive right and power * * * of establishing rules for deciding in all cases, what captures on land or water shall be legal, * * * appointing

> courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, * * *

Paterson's plan, presented to the Constitutional Convention on June 15, would have given to the federal judiciary jurisdiction on appeal "in all cases of captures from an enemy, in all cases of piracies and felonies on the high seas." Nothing was said as to admiralty jurisdiction. His plan was not adopted. On July 16, however, the Convention agreed nem. con. "That the National Legislature ought to possess the legislative rights vested in Congress by the Confederation." This proposal was committed to the Committee of Detail in Resolution VI on July 26. The Committee on August 6 in Article VII of their draft recommended a provision based on the Articles of Confederation which was shaped by the Convention on August 17 to read:

> to define and punish piracies and felonies committed on the high seas, counterfeiting the securities and current coin of the United States, and offenses against the law of nations.

Later, on recommendation of the Committee of Style, the provision as to counterfeiting was transferred to another clause, leaving the clause as to felonies on the high seas otherwise unchanged.

The States having retained their general admiralty and maritime jurisdiction under the Articles of Confederation it was necessary in the formation of the Constitution to provide for the grant of this jurisdiction to the United States. Accordingly in the Constitutional Convention on June 5 Wilson had said in argument that the admiralty jurisdiction ought to be given wholly to the national government. Nothing was done on the subject then. But Resolution XVI, which was committed to the Committee of Detail on July 26, provided—

> That the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature; and to such other questions as involve the national peace and harmony.

Wilson was one of the five members of the Committee of Detail chosen on July 24, and when that committee reported on August 6, Article XI, sec. 3, which was devoted to the jurisdiction of federal courts, contained a provision as to cases of admiralty and maritime jurisdiction.

Thus, Sec. 2 of Article III, extending the judicial power to all cases of admiralty and maritime jurisdiction, dealt with the powers retained by the States under the Articles of Confederation over matters within the admiralty and maritime jurisdiction; and Clause 10, Sec. 8, of Article I dealt with the power granted to Congress under the Articles of Confederation to define and punish pira-

cies and felonies on the high seas and offenses against the Law of Nations. Although Article III, Sec. 2, contains no express grant of legislative power over the substantive maritime law, the provision was regarded from the beginning as implicitly investing such power in the United States. This provision of the Constitution is therefore to be read as if it contained an express grant to Congress of legislative power over all matters within the admiralty and maritime jurisdiction. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, 386–388; *United States* v. *Bevans,* 3 Wheat. 336, 389; *Crowell* v. *Benson,* 285 U. S. 22, 39.

Considering the source and purpose of these two clauses of the Constitution, they must be regarded as complementary and as inclusive of all powers of sovereignty over maritime matters whether exercised by the Congress or by the States under the Articles of Confederation. To construe the express grant of power to define and punish piracies and felonies committed on the high seas as an exclusive definition of the power of Congress to punish offenses within the admiralty and maritime jurisdiction would at once bring the two clauses into irreconcilable conflict, with the result that a power inherent in sovereignty would be found to reside neither in the States nor in the United States.

We come, then, to the inquiry, which must be conclusive of decision in this case, and that is, whether the offense charged in the indictment was within

the maritime and admiralty jurisdiction as that jurisdiction was understood when the Constitution was framed and adopted.

As pointed out by Mr. Justice Story in *De Lovio* v. *Boit*, 2 Gall. 398, 459, 7 Fed. Cas. 418, 438—

> it is perfectly clear that the admiralty from the highest antiquity has exercised a very extensive criminal jurisdiction and punished offenses by fine and imprisonment. The celebrated inquisition at Queensborough, in the reign of Edward III, would alone be decisive.[1]

In England, from the time of Henry VIII, "treason, felonies, robberies, murders, and confederacies, committed upon the sea or in any haven, river, creek, or place where the admiral or admirals have or pretend to have power, authority or jurisdiction," were tried under Royal Commissions directed to the admiral or admirals and to three or four other substantial persons appointed by the Lord Chancellor. Proceedings in these specially constituted admiralty courts were in accordance with laws applicable in the trial of similar offenses committed upon the land. Statutes of 27 Hen. VIII, c. 4, and 28 Hen. VIII, c. 15. Holdsworth, History of English Law, 4th ed., I., 550–552; C. M. Andrews, Guide to Materials for American History in Pub. Records Office Great Britain, Vol. 2, 305, 306; Hale, Pleas of the Crown, 17; *King* v.

[1] See also the Statute of Richard II, 15 Rich. 2, c. 3; Benedict on Admiralty, 5th ed., 743, 748, 774.

Bruce, 2 Leach, Crown Cases, 353; Stephen, History of Criminal Law, II, 16–23; Brooks, Trial of Captain Kidd, 40, 57.

Thus, in England the trial of serious offenses committed within the admiral's jurisdiction came to be tried in specially constituted admiralty courts. As a matter of practice, persons designated by the Lord Chancellor to sit in these courts were usually Judges of the Common Law, but offenses committed upon the seas continued to be regarded as within the admiralty jurisdiction. The Judges sat not as Judges of Common Law Courts, but as Commissioners named in the Royal Commission, and were engaged in the trial of crimes within the admiralty and maritime jurisdiction of England. In *Bruce's Case,* (1812) 2 Leach Crown Cases 1099, Bruce was tried for murder, and the jury having rendered a verdict of guilty, the question whether the offense was committed within the admiralty jurisdiction—and therefore within the jurisdiction of Commissioners appointed under the Statute of Henry VIII—was reserved for the opinion of the twelve Judges. The Judges were unanimously of the opinion that there was no objection to the conviction on the ground of any supposed want of jurisdiction in the Commissioners. Decision turned upon the conclusion that the offense was within the admiralty jurisdiction. The statute in terms refers to such jurisdiction. 28 Hen. VIII, c. 15. The Royal Commissions were directed to the Judges of the High Court of Admiralty, and the offense charged was

laid "within the jurisdiction of the admiralty of England." 14 State Trials, 125, 130, 147. Cases were tried at the Admiralty Session in the Old Bailey. *Bruce's Case, supra.* The Sessions for the trial of such cases were known as "Sessions of Oyer and Terminer and Gaol Delivery for the Admiralty of England." Andrews, Guide, *supra,* Vol. 2, 305.

Holdsworth's statement, in his History of English Law, cited *supra,* that the effect of the Statute of Henry VIII was to transfer to the Judges of the courts of the common law the criminal jurisdiction of the admiralty, is accurate only in the sense that these Judges, sitting as Commissioners and not as Judges of the common law, were usually commissioned to conduct the trial of offenses within the admiralty and maritime jurisdiction, a jurisdiction stated in the statute, alleged in the indictment, and declared in the very title of the Court. This is the understanding of this ancient jurisdiction which prevails in the English Courts. *Queen* v. *Carr,* L. R. 10 Q. B. D. 76. *Queen* v. *Anderson,* L. R. 1 Crown Cases Reserved 161.

In the Colonies, as in England, offenses committed on the high seas or on streams within the ebb and flow of the tides were considered to be within the admiralty and maritime jurisdiction. Early in the 18th Century the practice under the Statute of Henry VIII (28 Hen. VIII, c. 15) was extended to the Colonies insofar as the prosecution of "piracies, felonies, and robberies" was con-

cerned. 11 and 12 Will. 3, c. 7; 2 Stephen, History of Criminal Law 20. So far as we have been able to discover, only petty maritime offenses were tried before the Colonial Vice-Admiralty Courts. Serious offenses, such as piracy, murder, and other felonies were tried before special Admiralty Courts in the Colonies or were sent to England for trial by Commissioners appointed under the Statute of Henry VIII.[2]

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[2] The Commissions of the Judges of the Vice-Admiralty Courts in the Colonies, no doubt following an ancient form, contain verbal grants of jurisdiction over crimes within the admiralty jurisdiction. Publications of Colonial Society of Massachusetts, Vol. II, 237, 288; Benedict on Admiralty, 5th ed., 792–811; Record Book of Maryland Court of Vice-Admiralty, in Manuscripts Division of the Library of Congress. One Joseph Hughes appears to have been tried in a special Admiralty Court at Providence, Rhode Island, for the murder of Michael Clarke. See Rhode Island: Letters from Governors in America, 1756, P. R. O.: C. O. 5: 17, p. 639. No doubt this proceeding, before a specially constituted Admiralty Court, was in accordance with the statutes of Henry VIII and William III. For instances of the trial of piracies in the Colonies see Jameson, Privateering and Piracy in the Colonial Period, pp. 143, note 2; 278, note 1; 286, note 1; 577–580. In Virginia, very shortly before the enactment of the statute of William III, a statute was passed adopting the provisions of the statute of Henry VIII. 3 Hening 176. Captain Kidd, whose arrest in Boston for murder and piracy on the high seas occurred prior to 1700, was transported to England, and there tried "in the ordinary way" in the Old Bailey before an Admiralty Court organized pursuant to Royal Commission. 14 State Trials, 123, 147, 191. For instances of petty offenses prosecuted in the Colonial Courts of Vice-Admiralty, see Hough's Cases in Vice-Admiralty and Admiralty: *King* v. *Booth* (1730), p. 12; *King* v. *Burgess* (1748), p. 56; *King* v. *White* (1754), p. 81.

Both Congress and this Court have recognized that criminal offenses, even when committed within the territorial waters of a foreign sovereignty, are within the maritime jurisdiction of the United States.

The Act of April 30, 1790, c. 9, sec. 8, 1 Stat. 112, 113, provided for the punishment of murder committed—

> upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state—

and declared that—

> the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.

Section 12 of this act dealt with manslaughter, but only when committed upon the high seas.

In *United States* v. *Bevans,* 3 Wheat. 336, 389, which involved a murder on a warship in Boston harbor, the Court held that while Congress might pass all laws which were necessary and proper for giving effect to the exercise of the admiralty and maritime jurisdiction, which is in the government of the Union, it had not so exercised that power as to place this offense in Boston harbor within the jurisdiction of the federal court.

In *United States* v. *Wiltberger,* 5 Wheat. 76, 104, which involved manslaughter on a Chinese river thirty-five miles from the mouth, the decision

turned upon the terms of section 12 of the Act of 1790, and the Court held that Congress had not attempted to deal with cases of manslaughter on foreign rivers.

The Act of March 3, 1825, c. 65, secs. 4, 5, 4 Stat. 115, provided—

> That, if any person or persons, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, shall commit the crime of wilful murder, * * * every person so offending, his or her counsellors, aiders, or abettors, shall be deemed guilty of felony, and shall, upon conviction thereof, suffer death.
>
> * * * That if any offence shall be committed on board of any ship or vessel, belonging to any citizen or citizens of the United States, while lying in a port or place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of said ship, or any passenger, on any other person belonging to the company of said ship, or any other passenger, the same offence shall be cognisable and punishable by the proper circuit court of the United States, in the same way and manner, and under the same circumstances, as if said offence had been committed on board of such ship or vessel on the high seas, and without the jurisdiction of such foreign sovereign or

> state: *Provided,* always, that if such offender shall be tried for such offence, and acquitted or convicted thereof, in any competent court of such foreign state or sovereign, he shall not be subject to another trial in any court of the United States.

The bill which became this Act was introduced in the House of Representatives by Daniel Webster, the chairman of the committee, who said (Gale & Seaton's Register of Debates, vol. 1, cols. 154, 158):

> The class of crimes provided for in this section not only might happen, but had actually occurred, without the existence of any law to punish them. Murders had been committed on board our own ships while lying in the harbors of foreign nations, and, for want of such a provision, they had gone unpunished.

The Revised Statutes provided:

> SEC. 5339. Every person who commits murder * * * upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State; * * * shall suffer death.
>
> SEC. 5346. Every person who, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, on board any vessel belonging in whole or in part to the United States, or any

> citizen thereof, with a dangerous weapon, or with intent to perpetrate any felony, commits an assault on another shall be punished by a fine of not more than three thousand dollars, and by imprisonment at hard labor not more than three years.

Section 5339 was applied in *Wynne* v. *United States,* 217 U. S. 234, in the case of a murder on an American vessel while lying in the harbor of Honolulu. Such a vessel was within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

Section 5346 was sustained and applied in *United States* v. *Rodgers,* 150 U. S. 249, in the case of an assault upon a person upon an American vessel upon the Canadian side of the Detroit River. The Court said (pp. 264, 265):

> It is true, as there stated, that, as a general principle, the criminal laws of a nation do not operate beyond its territorial limits, and that to give any government, or its judicial tribunals, the right to punish any act or transaction as a crime, it must have occurred within those limits. We accept this doctrine as a general rule, but there are exceptions to it as fully recognized as the doctrine itself. One of those exceptions is that offences committed upon vessels belonging to citizens of the United States, within their admiralty jurisdiction, (that is, within navigable waters,) though out of the territorial limits of the United States, may be judicially consid-

ered when the vessel and parties are brought within their territorial jurisdiction. As we have before stated, a vessel is deemed part of the territory of the country to which she belongs. Upon that subject we quote the language of Mr. Webster, while Secretary of State, in his letter to Lord Ashburton of August, 1842. Speaking for the government of the United States, he stated with great clearness and force the doctrine which is now recognized by all countries. He said: "It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the State retains its jurisdiction over them; and, according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion. This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practice of modern nations. If a murder be committed on board of an American vessel by one of the crew upon another or upon a passenger, or by a passenger on one of the crew or another passenger, while such vessel is lying in a port within the jurisdiction of a foreign state or sovereignty, the offence is cognizable and punishable by the proper court of the United States in the same manner as if such offence had been committed on board the vessel on the high seas. The law of England is supposed to be the same. It is true that the jurisdiction of a nation over a vessel belong-

> ing to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must, doubtless, be answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be waterborne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself." 6 Webster's Works, 306, 307.

A somewhat similar decision, not resting upon statute, was reached in *Queen* v. *Anderson,* L. R. 1 Crown Cases Reserved, 161, where a conviction for murder on a British ship in France, forty-five miles up the river Garonne, was sustained, Justice Blackburn saying (p. 169) that—

> the jurisdiction of the admiralty extends over vessels, not only when they are on the

> open sea, but also when in places where great ships do generally go.

See also *Queen* v. *Carr and Wilson,* 10 Q. B. D. 76.

After this Court had delivered its opinion in *United States* v. *Rodgers* and had spoken of admiralty jurisdiction as extending to navigable waters, including rivers, though out of the territorial limits of the United States, and had quoted with approval Webster's statement that a murder on an American vessel while lying in a foreign port was subject to the same jurisdiction as if it had been committed on the high seas, Congress enacted the Criminal Code (Act of March 4, 1909, c. 321, sec. 272, 35 Stat. 1088. 1142, U. S. C., Title 18, sec. 451) which provides:

> The crimes and offenses defined in this chapter shall be punished as herein prescribed:
>
> First. When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof. * * *

Later sections define murder and fix its punishment.

When these sections were under consideration the Senate members of the Special Joint Committee on the Revision of the Laws submitted a report in which they said (60th Congress, 1st Sess., Report 10, part 1, p. 10):

> That the admiralty and maritime jurisdiction of the United States extends to the high seas and all navigable waters within the territory of the United States will not be questioned. It seems equally clear that it extends to vessels belonging to the United States or to citizens thereof when on a navigable water within the limits of a foreign state, and all cases arising on board such vessel while on any such waters are clearly cases within the admiralty and maritime jurisdiction of the United States.

The statute carefully excludes from the jurisdiction of the District Courts offenses committed within the territorial jurisdiction of any State of the United States, but subject to this limitation expressly authorizes trial for named offenses, including murder, when committed (1) upon the high seas, (2) upon waters within the admiralty and maritime jurisdiction of the United States, and (3) on board any vessel belonging to any citizen of the United States if the offense is committed within the admiralty and maritime jurisdiction of the United States. The admiralty and maritime jurisdiction of the United States extends beyond its territorial waters to the high seas, and beyond the high

seas to offenses committed on board American vessels in navigable waters within the territorial jurisdiction of other nations. The offense charged was within the admiralty and maritime jurisdiction of the United States, was not within the jurisdiction of any of the States, and was therefore within the jurisdiction of the court below, as defined by this statute.

The statute is quite as broad as the sections of the Revised Statutes considered in the *Rodgers case, supra,* and in view of the history and the purpose of the law as well as the plain meaning of the phrase "admiralty and maritime jurisdiction of the United States," the application of the statute to the facts alleged at bar may not be doubted.

The exercise by Congress of its admiralty and maritime jurisdiction over offenses committed on board American vessels lying in foreign ports is in accord with the Law of Nations.

This is clear from the opinion of the Court in *United States* v. *Rodgers,* 150 U. S. 249. In *Queen* v. *Anderson,* L. R. 1 Crown Cases Reserved, 161; *Queen* v. *Carr and Wilson,* 10 Q. B. D. 76, *supra,* the courts sustained convictions for offenses committed within the territorial waters of a foreign sovereign.

Fiore's International Law Codified (translated by E. M. Borchard) declares (pp. 192, 193):

> Criminal jurisdiction over merchant vessels for offenses committed thereon must be assigned to the state which gives the vessel

> its nationality. This jurisdiction holds, even when the ship is in foreign territorial waters and ports, provided, however, that the offenses committed on board have no exterior consequences and do not affect the patrol of territorial waters or territorial public order. * * *
>
> With regard to serious offenses against "common" law which are committed on board without having any exterior consequences, the territorial state may be granted the right to intervene in order to proceed with the necessary preliminary examinations to preserve the proofs and the *corpus delicti,* reserving the surrender of the guilty person to the courts of the state to which the vessel belongs, in order that he may be tried in conformity with the law of that state.

The sixth English edition of Wheaton's International Law, I, 245, points out that the position taken in France and other continental countries, including Belgium, is that in the case of—

> Acts of mere interior discipline of the vessel, or even crimes and offenses committed by a person forming part of its officers and crew, against another person belonging to the same, where the peace of the port is not thereby disturbed * * * the rights of the Power, to which the vessel belongs, should be respected, and that the local authority should not interfere, unless its aid is demanded. These acts, therefore, remain under the police and jurisdiction of the state to which the vessel belongs.

See also Hall, International Law, 8th ed., p. 258; Moore, International Law Digest, II, p. 297.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted.

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FEBRUARY, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

FILE COPY

IN THE

Supreme Court of the United States

No. 307. OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, *Appellant*,

v.

SANTOS FLORES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLEE.

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In the Supreme Court of the United States.

OCTOBER TERM, 1932. No. 567.

The United States of America, Appellant,

v.

Santos Flores.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLEE.

STATEMENT.

The facts set out in the stipulation of counsel (R. 4) have, by that stipulation, the same force and effect as a bill of particulars filed by the Government and therefore must be considered as part of the indictment demurred to.

The indictment, so amplified, charges appellee, an American citizen, with murder of another

American citizen on board an American vessel when that vessel was attached to the shore by cables and was unloading cargo by means of a cable and sling at the Port of Matadi, a port under and subject to the sovereignty of the Kingdom of Belgium and located on the Congo River 250 miles inland from the river's mouth. It is charged in the indictment that on this factual situation the vessel was within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state of the United States. The Government contends the offense so charged was an offense against the peace and dignity of the United States and justiciable under Section 272 of the *Criminal Code.*

The District Court sustained a demurrer to the indictment and the accused was discharged without day (R. 1), the court holding that the case was controlled by *United States ex rel Maro* v. *Mathues,* 21 Fed. (2nd) 533, affirmed in *Mathues* v. *United States ex rel Maro,* 27 Fed. (2nd) 518 (C. C. A. 3rd). The indictment in the Maro case charged that the crime was committed—

> "upon the high seas out of the jurisdiction of any particular state of the United States, within the admiralty and maritime jurisdiction of the United States, and within the

> jurisdiction of this court, in and on board of a certain vessel of the United States * * * then being at anchor in the harbor or port of Livorno or Leghorn, Italy." (The indictment is quoted in full in the appendix to this brief.)

The language of this indictment is as broad as the phraseology of the Criminal Code. In the Government's brief filed in that case in the Circuit Court the question involved is stated as follows:

> "Did the United States District Court for the Eastern District of Pennsylvania have jurisdiction to try a person charged with violation of criminal statutes of the United States when the alleged violations occurred on board a vessel owned and operated by the United States Shipping Board, which vessel was, at the time of the occurrence, anchored in the Port of Livorno (Leghorn), Italy, being at the same time attached to a wharf by cables extending from the wharf to the ship (there not being sufficient water depth to permit ship to be moored alongside said wharf)?"

In that case, as here, the Government argued that the crime was one within the admiralty and maritime jurisdiction within the meaning of the Constitution and Section 272 of the *Criminal Code*. There was no inconsistency of statement

in the indictment in the Maro case and the question now before the court was there clearly raised.

The present appeal is taken by the Government from the order sustaining the demurrer. The Government does not contend that there is any valid distinction between the Maro case and the case at bar and in its brief admits that if the power of Congress to enact the law rests upon Article I, Section 8, Clause 10 of the Constitution "to define and punish piracies and felonies committed on the high seas and offenses against the laws of nations," the decision of the lower court was correct. The contention is that under Section 2 of Article III of the Constitution extending the judicial power of the United States to "all cases of admiralty and maritime jurisdiction," Congress has power to define and punish all crimes committed in any location if that location is a place within the admiralty and maritime jurisdiction of the United States and that an offense committed on an American vessel attached to the shore at a foreign port on a foreign river under the exclusive jurisdiction of a foreign sovereign many miles inland, is within the admiralty and maritime jurisdiction of the United States within the meaning of the *Constitution* and the *Criminal Code.*

It is the contention of the appellee that in its criminal jurisprudence relating to crimes against

private individuals, the United States has always adhered to the territorial principle of jurisdiction and has consistently refused to recognize the doctrine of extra-territoriality of merchant vessels in a foreign port.

That Congress in using the phrase "admiralty and maritime jurisdiction" in the *Criminal Code*, did not intend to depart from this territorial principle of jurisdiction as a history of the various previous statutes on the subject and their interpretation by the court demonstrates.

The power to punish crimes committed on waters is specifically granted by Article I, Section 8, Clause 10 of the Constitution and the phrase "admiralty and maritime jurisdiction" must be construed with reference to this provision to preserve its constitutionality; so construed the District Court had no jurisdiction over the offense.

ARGUMENT.

I.

THE CRIMINAL JURISDICTION OF THE UNITED STATES IS BASED UPON THE TERRITORIAL PRINCIPLE. In *United States* v. *Bowman*, 260 U. S. 94, 98, the late Chief Justice Taft said:

> "Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery * * * must, of course, be

committed within the territorial jurisdiction of the Government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute and failure to do so will negative the purpose of Congress in this regard."

James Bassett Moore, *Digest of International Law,* Volume 2, page 263, after discussing the theory of criminal jurisdiction, says:

"In the United States the territorial principle is the basis of criminal jurisdiction and the place of the commission of an offense is generally recognized as the proper and only place for its punishment."

"As a general rule the jurisdiction of a State is exclusive and absolute within its own territories of which harbors and territorial waters are as clearly a part as the land"—*Laurence—Principles of International Law,* p. 208.

It is suggested by the Government that the present case may be brought within this principle of territorial jurisdiction, on the fiction that a vessel is part of the territory of the nation whose flag she flies. This is a fiction of limited application.

In *Cunard Steamship Company* v. *Mellon,* 262 U. S. 100, 124, the court said:

"The defendants further contend that the amendment (Eighteenth) covers foreign merchant ships when within the territorial waters of the United States. Of course, if it were true that a ship is a part of the territory of the country whose flag she carries, the contention would fail, but as that is a fiction we think the contention is right.

"A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence just as with other objects within those limits."

The court describes the fiction as a "metaphor" citing *Scharrenburg* v. *Dollar Steamship Co.*, 245 U. S. 122, 127; *Re Ross*, 140 U. S. 453, 464; *1 Moore, International Law Digest*, Sec. 174; *Westlake, Internatinal Law*, 2nd Edition, page 264; *Hall, International Law*, 7th Edition, Sec. 76; *Manning, Law of Nations*, page 276; *Piggott, Nationality*, Pt. 2, page 13;*

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* See also *Wharton—International Law*, 2nd Ed. Vol. 1, §35a. Mr. Marcy, Secretary of State, to Mr. Clay, letter August 31, 1855, said: "This government does not apply the doctrine of extraterritoriality to its private or merchant ships in foreign ports, except in cases where it has been conceded by treaty or established by usage"; Moore, Vol. 1, §174 International Law refers to the jurisdiction of national ships on high seas as "quasi-territorial"; *Woolsey—Int. Law*, §54; *Field—International Code*, §309.

The cases cited by the government for an extended jurisdiction can be distinguished: In *King* v. *Bruce*, 2 Leach 353; *Queen* v. *Carr*, L. R. 10 Q. B. D. 76, and *Queen* v. *Anderson*, L. R. 1 Crown Cases Reserved 161, the locality of the offense was below the first bridge and within the ebb and flow of the tide. This falls literally within the Statutes of Richard. *Croxell* v. *Benson*, 285 U. S. 421 and *Panama R. R.* v. *Johnson*, 264 U. S. 375, relate to adjective law of procedure in admiralty rather than a substantive extension of the localities included in the jurisdiction.

> "The jurisdiction which it is intended to describe arises out of the nationality of the ship, as established by her domicile, registry and use of the flag, and partakes more of the characteristics of personal than of territorial sovereignty (cases cited). It is chiefly applicable to ships on the high seas where there is no territorial sovereign; and as respects ships in foreign territorial waters, it has little application beyond what is affirmatively or tacitly permitted by the local sovereign."

Phillip C. Jessup in his treatise, *Law of Territorial Waters and Maritime Jurisdiction,* page 119, in speaking of the extra-territoriality of merchant ships, says:

> "In the first place it may be definitely asserted that the fiction of territoriality of merchant vessels is not established in international law. In other words, all nations seem to agree that the basic principle holds true that a nation is sovereign throughout the extent of its territory and that ports and harbors are included within that territory. Even the French, and especially the Italian, jurisprudence which contain the widest application of the theory of the immunity of a vessel, seem to agree upon this point. In the second place, there is also general agreement that the local sovereign may act freely when the peace or tranquillity of the port is compromised, when strangers to the vessel

> are involved, or when the local authorities are appealed to. In the third place it must be confessed that there is not unanimity in regard to the exercise of local jurisdiction in matters solely affecting the internal order of the vessel. The United States and Great Britain assert the complete legal power of the local state and catalog exceptions under the heading of 'discretion.' This view seems to be followed by Chile and Ecuador and, through the medium of reciprocity, by Mexico and Brazil. The Netherlands also tend in this direction. As for those countries which adhere to the so-called French rule, such as France, Italy and Belgium, it has been noted that there is a tendency to accept the moral disturbance theory which is the same as that enunciated by the Supreme Court of the United States in the Wildenhus case."

In the *Wildenhus case,* 120 U. S. page 1, the defendant, a subject of Belgium, committed a murder on a Belgian steamship. He was a member of the crew as was also the deceased. The ship at the time was moored to a dock at the port of Jersey City and the killing occurred entirely below decks and in no way disturbed the peace and tranquillity of the port as a matter of fact. The Belgian Consul petitioned for the release of Wildenhus that he might be tried according to the law of Belgium. Under a treaty existing between the United States and Belgium

(21 Stat. 776) consuls were given exclusive charge of all matters concerning the internal order of the merchant vessels of their nation and the local authorities agreed not to interfere except when the nature of the offense was such as to disturb the tranquillity of the port. Chief Justice Waite, delivering the opinion of the court, said:

> "From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship and the general regulation of the rights and duties of the officers and crew towards the vessel and among themselves. And so, by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her and did not involve the peace or dignity of the country or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged, as the laws of that nation or the interests of its commerce should require."

The court next considers whether the offense was of a nature to disturb the public peace of the people who looked to the State of New Jersey for protection:

> "If the thing done * * * is of a character to affect those on shore, or in the port when it becomes known, the fact that only those on the ship saw it when it was done is a matter of no moment * * *. It is not alone the publicity of the act or the noise and clamor which attends it, that fixes the nature of the crime, but the act itself."

The court then quotes with approval *Ortolan (Diplomatie De la mer,* 4th Ed. 455, 456):

> "Considering that every state is interested in the repression of crimes and offenses that may be committed in the ports of its territory, not only by the men of the ship's company, of a foreign merchant vessel towards men not forming part of that company, but even by men of the ship's company among themselves, whenever the act is of a nature to compromise the tranquillity of the port or the intervention of the local authority is involved, or the act constitutes a crime by common law, the gravity of which does not permit any nation to leave it unpunished without impugning its rights of jurisdictional and territorial sovereignty, because that crime is in itself the most manifest as well as the most flagrant violation of the laws which it is the duty of every nation to cause to be respected in all parts of its territory."

It is thus apparent that the criminal jurisdiction with reference to such crimes as murder and manslaughter is essentially territorial. The doc-

trine of the territoriality of a merchant vessel applies strictly only when the ship is on the high seas and therefore under no other jurisdiction. When in a foreign port, the jurisdiction of the nation whose flag she flies extends only to matters affecting the internal order of the ship. When the offense is a grave crime, the United States considers that the act *in law* compromises the tranquillity of the port and takes jurisdiction, even if *in fact* the crime was accompanied by no publicity or disturbance—and even in the face of protest by the nation of the flag (*Wildenhus case*). It would be inconsistent for the government to claim a larger jurisdiction over the ships of its nationals in foreign ports than it is itself willing to concede over foreign ships in its own ports.

II.

THE PRIOR LEGISLATION NOW EMBODIED IN SEC. 272 OF THE CRIMINAL CODE AND THE INTERPRETATION OF THESE STATUTES BY THE COURT SHOWS THAT CONGRESS DID NOT INTEND TO DEPART FROM THE TERRITORIAL PRINCIPLE OF CRIMINAL JURISDICTION AND PUNISH THE CRIME OF MURDER COMMITTED WITHIN THE TERRITORIAL JURISDICTION OF ANOTHER SOVEREIGN.

The Criminal Code, Act of March 4, 1909, C. 321, Section 272, 35 Stat. 1088, 1142 (U. S. C. Title 18, Section 451) provides:

"The crimes and offenses defined in this chapter shall be punished as herein prescribed:

"First, when committed upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any state, territory or district thereof. * * *"

The phrase "admiralty and maritime jurisdiction" is taken from Article III, Section 2 of the Constitution and its scope and meaning must be determined by reference to the accepted conception of the jurisdiction of admiralty in England and the Colonies at the time the Constitution was adopted.

The admiralty jurisdiction of England originally extended to all crimes and offenses committed upon the sea and in all ports, rivers and arms of the sea as far as the tide ebbs and flows. *The Statute, 13 Richard II,* Chapter 5 modified this ancient jurisdiction by the following language:

> "That the admirals and their deputies, shall not meddle henceforth of anything done within the realm, but only of a thing done upon the sea, according as it hath been duly used in the time of the noble King Edward, grandfather of our Lord the King that now is."

Statute, 15 Richard II, Chapter 3 saved to the admiralty, jurisdiction of deaths and mayhem occurring on "great ships being hovering on the main streams of great rivers only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers." The effect of these statutes was much disputed by the proponents of the admiralty and the common law lawyers. The *Statute of 28 Henry VIII,* Chapter 15 gave the admiralty cognizance of "all treasons, felonies, robberies, murders committed in or upon the sea, or in any other haven, river, creek or place where the admiral or admirals have or pretend to have jurisdiction." Lord Hale in his exposition of the Statute, says:

> "This seems to me to extend to great rivers where the sea flows and reflows below the first bridges * * * but we are not to explain the words (pretend to have) to such a pretense as is without any right at all; and therefore, although the admiral pretend to have jurisdiction upon the shore when the tide is reflowed, yet he hath no cognizance

of a felony committed there." (2 Hale's P. C. 16, 17.)

In England after 1363 the "admiral's criminal jurisdiction was recognized as exclusive on the high seas. This exclusive jurisdiction could be exercised over British subjects, over the crew of a British ship, whether subject or not, and over any one in cases of piracy at common law. It could be exercised over no other person." *(Holdsworth Vol. 1, p. 550—Hist. of Eng. Law.)*

The colonial courts of Vice-Admiralty exercised a somewhat more extensive jurisdiction but it was long established that the jurisdiction extended only to the high seas and to waters where the tide ebbs and flows. (See Story's elaborate opinion in *DeLovio* v. *Boit,* 7 Fed. Cas. 418; *U. S.* v. *Coombs,* 12 Peters 70; *U. S.* v. *James M'Gill,* 4 Dallas 424.)

The present Criminal Code was preceded by and is in the nature of a re-enactment of several criminal statutes on the subject. A careful study of the provisions of these former enactments and the cases decided under their terms shows that Congress has not attempted to extend its criminal jurisdiction to crimes committed within a foreign territorial port and this court, in construing these statutes, has never sustained a conviction for such a crime as being within the admiralty jurisdiction.

The *First Crimes Act, April 30, 1790,* Chapter 9, Section 8, 1 Stat. 112, 113, provided for the punishment of murder committed upon:

> "the high seas or in any river, haven, basin or bay out of the jurisdiction of any particular state. * * *"

The language of this act follows substantially the phraseology of the *Statute of 28 Henry VIII,* Chapter 15 and of the commissions issued to the vice admirals of the Colonies, and in accordance with the conception of the jurisdiction which has been accepted, the terms "river, haven, basin or bay" must logically be limited to places which feel the ebb and flow of the tide.

In *United States* v. *James M'Gill,* 4 Dallas 424, 427, the defendant had given a mortal stroke to one in the haven of Cape Francois but the deceased did not die until his removal on shore. The indictment was under Section 8. Mr. Justice Washington, after deciding that the death as well as the mortal stroke must happen on the high seas, said:

> "But the more important question is, whether the present case remains unprovided for by the laws of the United States. * * *
>
> "we have been properly referred to the Constitutional provision that 'the judicial powers shall extend to all cases of admiralty

> and maritime jurisdiction,' but still the question recurs, is this a case of admiralty and maritime jurisdiction within the meaning of the Constitution? The words of the Constitution must be taken to refer to the admiralty and maritime jurisdiction of England (from whose code and practice we derive our system of jurisprudence, and, generally speaking, obtain the best glossary). But no case, no authority has been produced to show that in England such a prosecution would be sustained * * * as a cause of admiralty and maritime jurisdiction. * * * Upon the whole, therefore, I am of opinion that the present is a case omitted in the law; and that the indictment cannot be sustained."

Here we have an offense which admittedly and literally took place in a "haven," but the court in effect held that in addition to this, the offense to be indictable under the Act must further have been one of which admiralty would take cognizance.

In *United States* v. *Bevans,* 3 Wheat. 336, 388, which involved a murder on a United States warship in Boston Harbor, it was contended by the Government that since the granting of admiralty jurisdiction to the federal courts was exclusive, there was no such jurisdiction remaining in the states, and therefore the condition

that the offense must be committed "out of the jurisdiction of any particular state," was met. Chief Justice Marshall very clearly illustrates the distinction between admiralty jurisdiction and territorial, criminal or general jurisdiction:

> "Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise?
>
> * * * * * * *
>
> "It is observable that the power of exclusive legislation (which is jurisdiction) is united with cession of territory * * *. It is difficult to compare the two sections together without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power the framers of our Constitution had not in view any cession of territory; or what is essentially the same, of general jurisdiction."

In *United States* v. *Wiltberger*, 5 Wheat. 76, the indictment was under Section 12 of the Act of 1790 which punished manslaughter committed on the high seas. The manslaughter in this case was committed on an American vessel when the vessel was 100 yards from the shore on a Chinese river (35 miles above its mouth). The court in an opinion by Chief Justice Marshall construed the statute strictly, holding that the words

"high seas" could never extend to a river in the interior of a country.

After the decision in the *Wiltberger case,* the *Crimes Act,* was redrafted by Mr. Justice Story, becoming the *Act of March 3, 1825,* Chapter 65, 4 Stat. 115 (1 Story, Life of Story, 297, 437, 439, 440; 2 Story, Life of Story, 402). Section 4 of this Act provides for punishment of murder committed:

> "upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state * * *."

The Act further provides for the punishment of offenses committed on an American ship by any passenger or person belonging to the company of the said ship, on any other person of like description while the ship is lying in a foreign port. But it is provided:

> "that if such offender shall be tried for such offense, and acquitted or convicted thereof in any competent court of such foreign state or sovereign, he shall not be subject to any trial in any other court of the United States."

The fact that the courts held that the description of the places mentioned in the Act of 1790 must further meet the description "within the ad-

miralty and maritime jurisdiction of the United States," accounts for the inclusion of this phrase in the Act of 1825, and it is submitted that its inclusion made no change in the law. It is further important to observe that the jurisdiction over crimes committed on an American vessel in a foreign port was strictly limited to offenses by one member of the personnel of the ship against another, and the proviso clearly indicates that Congress did not intend to subject such offenders to a double trial and recognized the jurisdiction of the territorial sovereign.

In *United States* v. *Coombs,* 12 Peters 70, 75, 78, the defendant was indicted under Section 9 of the Act of 1825 for stealing merchandise belonging to a ship in distress and cast away on a shoal of the sea on the coast of New York. The case is primarily of interest in this discussion as showing what interpretation Mr. Justice Story, the author of the Act, placed upon the phrase "in any place within the admiralty and maritime jurisdiction of the United States":

> "Before we proceed to the direct consideration of the true import and interpretation of this section, it seems highly important, if not indispensable, to say a few words as to the constitutional authority of Congress to pass the same. For if, upon a just interpre-

> tation of the terms thereof, Congress have exceeded their constitutional authority, it will become our duty to say so. * * * On the other hand, if the section admits of two interpretations, each of which is within the constitutional authority of Congress, that ought to be adopted which best conforms to the terms and the objects manifested in the enactment and the mischiefs which it was intended to remedy. And again, if the section admits of two interpretations, one of which brings it within and the other presses it beyond the constitutional authority of Congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged that Congress meant to exercise or usurp any constitutional authority. * * *"

Referring to the clause of the Constitution giving to the federal courts jurisdiction in admiralty and maritime cases, Mr. Justice Story says:

> "* * * the question which arises is, what is the true nature and extent of admiralty jurisdiction? Does it, in cases where it is dependent upon locality, reach beyond high water mark? Our opinion is that in cases purely dependent upon the locality of the act done, it is limited to the sea, and to tide-waters, as far as the tide flows, and that it does not reach beyond high water mark. It

> is the doctrine which has been repeatedly asserted by this court and we see no reason to depart from it."

The learned justice then refers to several cases where the jurisdiction of the admiralty is not limited by the locality of the acts done, and concludes:

> "In our judgment, the authority of Congress under this clause of the Constitution does not extend to punish offenses committed above and beyond high water mark."

The next revision of the criminal law on the subject appears in the *Revised Statutes,* Sections 5339 and 5346. These statutes describe the locus of the crime necessary to give jurisdiction as "upon the high seas or in any arm of the sea or in any river, haven, creek, basin or bay within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state." Section 5346 punishes certain offenses within the above described locus when committed on board an American vessel. It is important to note that in this revision there is no specific reference to offenses committed on an American vessel while in a "foreign port." Likewise, the proviso in the Act of 1825 aimed at preventing an offender being tried twice—once

by the territorial sovereign and again by the United States—is dropped.

In *Wynne* v. *United States,* 217 U. S. 234, 241, 244, the indictment was under Section 5339 of the Revised Statutes. The case turned entirely on the meaning of the word "state" in the phrase, "out of the jurisdiction of any particular state." Mr. Justice Lurton, delivering the opinion of the court, stated the question thus:

> "Shortly stated, the contention is that the haven or arm of the Pacific Ocean which constitutes the Harbor of Honolulu, although 'within the admiralty and maritime jurisdiction of the United States,' is a locality not 'out of the jurisdiction of any particular state' because within the jurisdiction of Hawaii."

The court on ample authority held that the word "state" referred to a state of the United States, and further, that there was nothing in the legislation applicable to the territory of the Hawaiian Islands which prevented the operation of Section 5339. The territory of Hawaii is not a foreign sovereign:

> "It was within the power of Congress to confer upon its courts exclusive jurisdiction over all offenses committed within the territory, whether on land or water."

United States v. *Rodgers,* 150 U. S. 249, 258, 266, was an indictment under Section 5346, involving an offense committed on an American vessel upon the Canadian side of the Detroit River. The case turns on the scope of the expression "high seas." In an opinion by Mr. Justice Field, the court held that the Great Lakes—

> "* * * possess all of the general characteristics of open seas, except in the freshness of their waters and in the absence of the ebb and flow of the tide * * * They are inland seas and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tidewaters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes.
>
> * * * * * * *
>
> "It is true that lakes properly so-called, that is, bodies of water whose dimensions are capable of measurement by the unaided vision, within the limits of a state, are part of its territory and subject to its jurisdiction, but bodies of water of an extent which cannot be measured by the unaided vision and which are navigable at all times in all directions, and border on different nations or states or people, * * * are seas in fact, however they may be designated."

The decision of the court then proceeds on the theory that the Detroit River is an arm of the sea and an offense occurring on an American vessel on the Canadian side of the river falls within the statute. The Detroit River connects the waters of Lake Huron with the waters of Lake Erie and constitutes the boundary between Canada and the United States and is in the nature of a strait connecting two seas, rather than a "river" properly so-called. It is submitted that the situation here presented is entirely distinct from the case of port on a river entirely within the body of a foreign sovereign and thus forming part of the territorial sovereignty, and this observation has particular force when the vessel is attached to the shore as was the case in the present appeal. Mr. Justice Gray in an elaborate opinion, dissented on the ground that the Great Lakes were not "high seas" within the meaning of the *Crimes Act*. Mr. Justice Brown filed a similar dissenting opinion.

The final form of the criminal statute is Section 272 of the *Criminal Code* quoted above. It is to be observed that in this enactment the phrase "in any river, haven, creek, basin or bay" has been omitted, and instead the phrase "on any other waters within the admiralty and maritime jurisdiction" is used. The phraseology thus used copies the phraseology of the Constitution.

United States ex rel Maro v. *Mathues,* 21 Fed. (2nd) 533, 534 held that this section did not apply where the offense charged was committed on an American vessel moored to a wharf in a foreign port. The court said:

> "The offense here, if any, was committed in an Italian port. The quoted expression of Congress (within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state) evidently has application to domestic and not foreign waters and to waters which are outside of the jurisdiction of any nation and are commonly denominated the high seas."
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> * * * * * * *
>
> "Congress (at least expressly) is not given authority 'to define and punish felonies' but is given such power only when the felonies are committed on the high seas. The point sought to be made clear is that the question is not one of admiralty and maritime jurisdiction but is one of criminal jurisdiction."
>
> * * * * * * *
>
> "This brings us to the proposition that Congress has not undertaken to define and punish felonies other than those committed on the high seas or upon waters within the territorial jurisdiction of the United States,

> which are not within the jurisdiction of any particular state * * *."

In affirming the decision of the District Court in this case (*Mathues* v. *U. S. ex rel Maro,* 27 Fed. (2nd) 518), the Circuit Court of Appeals for the Third Circuit in an opinion by Judge Buffington construed Section 272 of the *Penal Code* as resting upon the constitutional provision enabling Congress to define and punish felonies committed on the high seas.

It is submitted, after a careful study of the phraseology of these various criminal statutes and the cases decided under them, that the continuing intention of Congress has been to limit the criminal jurisdiction of the Federal courts to offenses committed on the high seas or waters having characteristics of the high seas for practical commercial purposes, and the court in construing the phrase "admiralty and maritime jurisdiction" in these statutes has applied it only to the high seas or waters which are *res nullius* and essentially public in character where the ships of all nations may go as a matter of natural right.

At this point, in order to prevent any confusion, it should be emphasized that we are here dealing with the criminal jurisdiction of the dis-

trict courts which is entirely distinct from the admiralty courts' jurisdiction over contracts and torts and other special cases. Thus in *Waring* v. *Clarke,* 5 Howard, 441, 454, 464, the court held that a libel *in rem* to recover damages for a collision on the Mississippi River was justiciable in admiralty even though the place of the collision was *infra corpus comitatis,* and in *Genessee Chief* v. *Fitzhugh,* 12 Howard, 443, 454, the court held that admiralty had jurisdiction over a collision occurring on the Great Lakes on the ground that they were in fact "inland seas" and that the same reasons which induced admiralty to take jurisdiction of collisions on the high seas applied with equal force to the Great Lakes:

> "If it is a public navigable water on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same."

Since this decision, it has generally been conceded that "navigability" is the test of civil jurisdiction in matters of tort.

If, however, we assume that all navigable waters were comprehended by the phrase "admiralty and maritime jurisdiction," in the Criminal Code the jurisdiction would be absurdly extended. Such a construction would cover a crime committed on a foreign ship by a foreigner against another foreigner in any navigable river

on the globe (excepting only waters within the jurisdiction of a state of the United States). Furthermore, if this were so, the third clause of the section referring to crimes committed on an American vessel would have no meaning since the case would be covered by the second clause.

Obviously, the general words of the statute must be limited to the jurisdiction of the sovereign and the intended objects of the legislation:

> "The words of the section," said Chief Justice Marshall, referring to Section 8 of the Act of 1790, "are in terms of unlimited extent. The words 'any person or persons' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state but also to those objects to which the legislature intended to apply them. * * * It would seem offenses against the United States, not offenses against the human race, were the crimes which the legislature intended by the law to punish." (*U. S.* v. *Palmer,* 3 Wheat, 610.)

Now, if in the Statute of 1825 the general provision was to operate within a foreign jurisdiction, there would be no need for the limited jurisdiction over certain offenses committed on American ships covered by Section 5, which section by its very terms applies to foreign ports. The conclusion therefore seems irresistible that the gen-

eral provision did not contemplate a foreign port and since the general phraseology is carried into the present act, its construction must be the same as it was in prior acts.

The provision respecting crimes on American vessels in the *Revised Statute* and in the *Criminal Code* is likewise generalized and not limited to the personnel of the ship or its internal regulation. In passing the Acts Congress must have been aware that under previous legislation the only crimes in a foreign port made punishable were those under Section 5 of the *Act of 1825*. Can it be said that by dropping the express language extending the jurisdiction to a foreign port, Congress intended to assert greater jurisdiction in such a port? Failure to state expressly an extraterritorial operation of a criminal statute negatives the purpose of Congress in this regard (*U. S.* v. *Bowman*, 260 U. S. 94, 98),* since the offense is not one of that peculiar character such as treason, which would be equally calculated to injure the Federal Government or its citizens wherever committed.

* The English courts likewise refuse to extend general criminal jurisdiction beyond the territory of the sovereign without express statutory authority. In *R.* v. *Keyn L. R.*, 2 Ex. Div. 63, the judges admitted that any nation by international law could exercise jurisdiction over waters washing the coast to the three-mile limit but refused to take jurisdiction of a crime committed within these territorial waters by a foreigner on the ground that such jurisdiction had never been exercised by any English king. This necessitated the passage of the *Territorial Waters Jurisdiction Act* of 1878 *specifically* assuming this jurisdiction.

Every principle which takes out of the operation of the Acts of Congress crimes committed by Americans on foreign vessels on the high seas, applies with greater force to offenses committed within the acknowledged and fixed territorial limits of a foreign state because it is dependent entirely on the national character of the place of the offense, and cannot, by any sound reasoning, reach that which is territorial by implication only, and yet be excluded from that which is actual territory.

It is submitted that at most Congress, by the broad phraseology of the *Criminal Code* covering offenses committed on American ships, intended no enlargement of the jurisdiction given by Section 5 of the Act of March 3, 1825, c. 65 in foreign ports. Such jurisdiction would not cover the case at bar because it is not alleged in the indictment that the defendant and the deceased were members of the crew or passengers. Only such a construction would bring the statute into conformity with international law and the territorial principle of criminal jurisdiction as applied by the Federal Courts.

Criminal statutes must be construed strictly and the phrase "admiralty and maritime jurisdiction of the United States" must be construed as including those places where that jurisdiction is *complete*—where, as a matter of absolute right,

the executive officers of the government can enforce the laws and make arrests—where no other sovereign has jurisdiction. This applies externally only to the "high seas" or waters which are in their nature high seas over which no one nation can exercise exclusive dominion.

This construction is in conformity with the opinion of Attorney General Cushing, *7 Op. of Atty.-Gen., 721,* July 21, 1856:

> "The criminal jurisdiction of our courts does not extend to acts of violence committed on board a ship within the jurisdiction of a foreign state, but only to such acts committed on the high seas, or in any river, haven, lake, or bay out of the jurisdiction of any particular state (See *Act of April 30, 1790,* 1 Stat. at Large, p. 113; also the *Schooner Exchange* v. *McFadden,* 7 Cranch, 116, 144; *U. S.* v. *Wiltberger,* 5 Wheaton, 76; *Ortolan, Diplomatie de la Mer II,* Chap. 13)."

III.

THE GRANT OF LEGISLATIVE POWER TO CONGRESS TO DEFINE AND PUNISH FELONIES COMMITTED ON WATERS RESTS ON ARTICLE I, SECTION 8, CLAUSE 10 OF THE CONSTITUTION AND THE CRIMINAL CODE MUST BE CONSTRUED WITH REFERENCE TO THE CONSTITUTIONAL GRANT.

A further consideration, which we submit should induce the court to accept a narrow construction of the phrase "admiralty and maritime

jurisdiction" as used in the Criminal Code, is the question of the constitutionality of the statute. It is well settled that there are no crimes at common law cognizable by the Federal courts. The only express power given to Congress to define and punish felonies committed on waters is the power given under Article I, Section 8, Clause 10 of the Constitution, and this is limited to piracies and felonies committed on the high seas and offenses against the law of nations. Congress is given no grant of legislative power over the substantive maritime law. The grant of jurisdiction of admiralty and maritime cases occurs in an entirely separate article and it is submitted that the concluding paragraph of Article I, giving Congress the right "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or any department or officer thereof," has no direct application to Section 2 of Article III, since this section merely transferred the existing admiralty jurisdiction residing in the states under the Article of Confederation to the Federal government. Mr. Justice Story, in *United States* v. *Coombs,* 12 Peters 72, 78, stated:

> "In our judgment the authority of Congress under this clause of the Constitution does not

extend to punish offenses committed above and beyond high water mark."

This was the view taken by Mr. Justice Washington (*U. S.* v. *M'Gill,* supra), by Judge Dickinson (*Maro case,* supra), and by Judge Buffington on appeal (*Maro case,* supra).

Where a power is given in express terms as in the power to define and punish felonies committed on the high seas, Congress cannot ignore the express power and infer the same power without limitation from some other provision in which the power is not expressed. (See *People* v. *Tyler,* 7 Mich. 162, for a very full discussion of this question.)*

A consideration of the constitutional basis of the statute leads to the narrower construction here contended for and the application of the rule laid down by Mr. Justice Story (*U. S.* v. *Coombs,* supra):

* In this case the Supreme Court of Michigan held similar views. All the judges of the court filed opinions. Martin, *Ch. J.*, and Campbell, *J.*, held the *Crimes Act of March 3, 1857* (which contains the same general phraseology "within the admiralty jurisdiction etc."), was not intended to apply to rivers within the exclusive jurisdiction of a foreign sovereign. Christiancy, *J.*, reached the same conclusion limiting the scope of the Act to the grant of power contained in Article 1, Section 8, Clause 10, of the Constitution. Manning, *J.*, thought the Act extending admiralty jurisdiction over the Great Lakes unconstitutional. This case involved a crime on the St. Clair River which connects Lake Huron and Lake Erie and is in fact in the nature of a strait connecting two "inland seas." The river is therefore probably within the jurisdiction of the statute and the actual decision cannot be reconciled with *U. S.* v. *Rodgers,* supra. The reasoning, however, applies with force to the present appeal where the locality was a foreign port entirely within the jurisdiction of a foreign territorial sovereign.

"if the section admits of two interpretations, one of which brings it within and the other presses it beyond the constitutional authority of Congress, it will become our duty to adopt the former construction."

IV.

CONCLUSION.

The general language "admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state" used to describe location in the Criminal Code, is limited by the territorial principle of criminal jurisdiction and the constitutional grant of power to Congress to define and punish felonies on the high seas. Congress did not intend the act to apply to such a crime as murder committed in a foreign port in the interior of a country many miles from the sea.

The judgment of the District Court should be affirmed.

Respectfully submitted,

JOHN V. LOVITT,
Attorney for Appellee.

BALLARD, SPAHR, ANDREWS & INGERSOLL,
Of Counsel.

APPENDIX.

INDICTMENT.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

United States of America,
v.
Joseph Maro, alias Giuseppe Marro
No. 1758
June Sessions, 1926.

COUNT I

The Grand Inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their respective oaths and affirmations, do present, that heretofore, on or about August 8, 1924, upon the high seas, out of the jurisdiction of any particular state of the United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this Court, in and on board of a certain vessel of the United States, to wit: the American Steamship "City of St. Joseph", then being at anchor in the harbor or port of Livorno or Leghorn, Italy, one JOSEPH MARO, alias GIUSEPPE MARRO, with force and arms, by

striking him on and about the head with a bottle, in and upon the body of one Joseph C. Koontz, then and there being, feloniously, wilfully, deliberately, with premeditation, and of his malice aforethought, did kill and murder the said Joseph C. Koontz:

Contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

COUNT II

And the Grand Inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations, as aforesaid, do further present, that heretofore, to wit: on August 8, 1924, the said Joseph Maro, alias Giuseppe Marro, upon the high seas, out of the jurisdiction of any particular State of the United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this Court, in and on board of a certain vessel of the United States, to wit: the American Steamship "City of St. Joseph," then being at anchor in the harbor or port of Livorno or Leghorn, Italy, with force and arms, by striking him on and about the head with a bottle, in and upon the body of one Joseph C. Koontz, then and there being, feloniously, wilfully, deliberately, with premeditation, and of his malice afore-

thought, did make an assault, and then and there feloniously, wilfully, deliberately, with premeditation, and of his malice aforethought, did give to the said Joseph C. Koontz, a mortal wound, of which said mortal wound, the said Joseph C. Koontz, from the 8th day of August, 1924, until the 5th day of October, 1924, upon the high seas, out of the jurisdiction of any particular State of the United States, within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of this Court, did languish, and languishing, did live, on which same 5th day of October, 1924, the said Joseph C. Koontz, within the jurisdiction of this Court, of the said mortal wound, did die.

And so the Grand Inquest aforesaid, upon their respective oaths and affirmations aforesaid, do say that the said Joseph Maro, alias Giuseppe Marro, him the said Joseph C. Koontz, in manner and form aforesaid, feloniously, wilfully, deliberately, with premeditation, and of his malice aforethought, did kill and murder:

Contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

(Sgd.) GEORGE W. COLES,
United States Attorney.

Philadelphia, Pa.
13 September, 1926.

SUPREME COURT OF THE UNITED STATES.

No. 567.—October Term, 1932.

The United States of America, Appellant, *vs.* Santos Flores.	Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

[April 10, 1933.]

Mr. Justice Stone delivered the opinion of the Court.

By indictment found in the District Court for Eastern Pennsylvania, it was charged that appellee, a citizen of the United States, murdered another citizen of the United States upon the S. S. "Padnsay", an American vessel, while at anchor in the Port of Matadi, in the Belgian Congo, a place subject to the sovereignty of the Kingdom of Belgium, and that appellee, after the commission of the crime, was first brought into the Port of Philadelphia, a place within the territorial jurisdiction of the District Court. By stipulation it was conceded, as though stated in a bill of particulars, that the "Padnsay", at the time of the offense charged, was unloading, being attached to the shore by cables, at a point two hundred and fifty miles inland from the mouth of the river. Congo

The District Court, following its earlier decision in *United States ex rel Maro* v. *Mathues*, 21 F. (2d) 533, affirmed, 27 F. (2d) 518, sustained a demurrer to the indictment and discharged the prisoner on the ground that the court was without jurisdiction to try the offense charged. — Fed. —. The case comes here by direct appeal under the Act of March 2, 1907, c. 2564, 34 Stat. 1264, 18 U. S. C. § 682 and § 238 of the Judicial Code, as amended by Act of February 13, 1925, 28 U. S. C. § 335, the court below certifying that its decision was founded upon its construction of § 272 of the Criminal Code, 18 U. S. C. § 451.

Sections 273 and 275 of the Criminal Code, 18 U. S. C. §§ 452, 454, define murder and fix its punishment. Section 272, upon

[1] § 272. "The crimes and offenses defined in this chapter shall be punished as herein prescribed:

"First: When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the

the construction of which the court below rested its decision, makes punishable offenses defined by other sections of the Criminal Code, among other cases, "when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, on board any vessel belonging in whole or in part to the United States" or any of its nationals. And by § 41 of the Judicial Code, 28 U. S. C. § 102, venue to try offenses "committed upon the high seas or elsewhere out of the jurisdiction of any particular State or district," is "in the district where the offender is found or into which he is first brought". As the offense charged here was committed on board a vessel lying outside the territorial jurisdiction of a state, see *Wynn* v. *United States*, 217 U. S. 234; *United States* v. *Rodgers*, 150 U. S. 249, 265, and within that of a foreign sovereignty, the court below was without jurisdiction to try and punish the offense unless it was within the admiralty and maritime jurisdiction of the United States.

Two questions are presented on this appeal, first, whether the extension of the judicial power of the Federal government "to all cases of admiralty and maritime jurisdiction", by Art. III, § 2 of the Constitution confers on Congress power to define and punish offenses perpetrated by a citizen of the United States on board one of its merchant vessels lying in navigable waters within the territorial limits of another sovereignty; and second, whether Congress has exercised that power by the enactment of § 272 of the Criminal Code under which the indictment was found.

The court below thought, as appellee argues, that as § 8 of Art. I of the Constitution specifically granted to Congress the power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations", and "to make rules concerning captures on land and water", that provision must be regarded as a limitation on the general provision of § 2 of Art. III, that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction"; that as the specific grant of power to punish offenses outside the territorial limits of the

jurisdiction of any particular State, or when committed within the admiralty and maritime jurisdction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof. . . ."

United States was thus restricted to offenses occurring on the high seas, the more general grant could not be resorted to as extending either the legislative or judicial power over offenses committed on vessels outside the territorial limits of the United States and not on the high seas.

Before the adoption of the Constitution, jurisdiction in admiralty and maritime cases was distributed between the Confederation and the individual states. Article IX of the Articles of Confederation provided that "the United States, in Congress assembled, shall have the sole and exclusive right and power . . . of establishing rules for deciding in all cases what captures on land or water shall be legal, . . . appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures . . .". So much of the general admiralty and maritime jurisdiction as was not included in this grant of power remained with the states. The powers thus granted were in substance the same as those later conferred on the national government by Article I, § 8 of the Federal Constitution. This section was adopted to carry out a resolution of the Convention "that the national legislature ought to possess the legislative rights vested in Congress by the Confederation". Its primary purpose and effect was to transfer to the newly organized government the powers in admiralty matters previously vested in the Confederation.[2]

A proposal independently made and considered in the Convention that "the admiralty jurisdiction ought to be given wholly to the national government", resulted in the adoption of Article III, § 2, by which the judicial power of the United States was extended to all cases of admiralty and maritime jurisdiction.[3]

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[2]On July 16, 1787, the Convention agreed *nem. con.* "that the national legislature ought to possess the legislative rights vested in Congress by the Confederation". This proposal was committed to the Committee of Detail in resolution VI, of July 26th. The Committee, on August 6th, in Article VII of their draft, recommended a provision, based on the articles of Confederation, which, as formulated by the Convention on August 17th, and amended in matters not now material by the Committee on Style, was included in Article I, § 8, of the Constitution. See Madison's Diary, International Edition, pp. 260, 333, 340, 341, 415, 416.

[3]On June 5, 1787, Wilson stated to the Convention that he thought the admiralty jurisdiction should be given wholly to the national government. Resolution XVI, which was referred to the Committee on Detail on July 26th, provided that the jurisdiction of the national judiciary "shall extend to cases

This section has been consistently interpreted as adopting for the United States the system of admiralty and maritime law, as it had been developed in the admiralty courts of England and the Colonies, and, by implication, conferring on Congress the power, subject to well recognized limitations not here material,[4] to alter, qualify, or supplement it as experience or changing conditions may require. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 386, 388; *Crowell* v. *Benson*, 285 U. S. 22, 39; see *The Oconee*, 280 Fed. 927; *United States* v. *Bevans*, 3 Wheat. 336, 389.

In view of the history of the two clauses and the manner of their adoption, the grant of power to define and punish piracies and felonies on the high seas cannot be deemed to be a limitation on the powers, either legislative or judicial, conferred on the national government by Article III, § 2. The two clauses are the result of separate steps independently taken in the Convention, by which the jurisdiction in admiralty, previously divided between the Confederation and the States, was transferred to the national government. It would be a surprising result, and one plainly not anti-

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arising under laws passed by the general legislature and to such other questions as involve the natural peace and harmony". Wilson was one of the five members of the Committee on Detail, chosen on July 24th, which reported, August 6th, Article XI, dealing with the jurisdiction of federal courts, and containing in § 3 a provision extending the jurisdiction of the Supreme Court "to all cases of admiralty and maritime jurisdicton" which was ultimately incorporated in § 2 of Article III of the Constitution, as finally adopted. Madison's Diary, International Edition, pp. 61, 336, 317, 318, 344.

[4]In Panama R. R. Co. *v.* Johnson, 264 U. S. 375, 386, 387, the Court said: "When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion. But there are limitations which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provision require that the enactments,—when not relating to matters whose existence or influence is confined to a more restricted field, as in Cooley *v.* Board of Wardens, 12 How. 299, 319,—shall be coextensive with and operate uniformly in the whole of the United States. Waring *v.* Clarke, 5 How. 441, 457; The Lottawanna, 21 Wall. 558, 574, 577; Butler *v.* Boston & Savannah S. S. Co., 130 U. S. 527, 556, 557; In re Garnett, 141 U. S. 1, 12; Southern Pacific Co. *v.* Jensen, 244 U. S. 205, 215; Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149, 164; Washington *v.* Dawson & Co., 264 U. S. 219; 2 Story Const., 5th ed., §§ 1663, 1664, 1672."

cipated by the framers or justified by principles which ought to govern the interpretation of a constitution devoted to the redistribution of governmental powers, if part of them were lost in the process of transfer. To construe the one clause as limiting rather than supplementing the other would be to ignore their history, and without effecting any discernible purpose of their enactment, to deny to both the states and the national government powers which were common attributes of sovereignty before the adoption of the Constitution. The result would be to deny to both the power to define and punish crimes of less gravity than felonies committed on vessels of the United States while on the high seas, and crimes of every grade committed on them while in foreign territorial waters.

As we cannot say that the specific grant of power to define and punish felonies on the high seas operated to curtail the legislative or judicial power conferred by Art. III, § 2, we come to the question principally argued, whether the jurisdiction over admiralty and maritime cases, which it gave, extends to the punishment of crimes committed on vessels of the United States while in foreign waters. As was pointed out by Mr. Justice Story, in the course of an elaborate review of the history of admiralty jurisdiction, in *DeLovio* v. *Boit*, 7 Fed. Cas. 418, 438, admiralty "from the highest antiquity has exercised a very extensive criminal jurisdiction and punished offenses by fine and imprisonment."[5] The English

[5]In England, serious offenses committed "upon the sea, or in any other haven, river, creek or place where the admiral or admirals have or pretend to have power, authority or jurisdiction" were, after the statute 27 Henry VIII c. 4, and 28 Henry VIII, c. 15, tried according to the course of the common law before specially constituted admiralty courts, the judges of which were designated to sit by the Lord Chancellor. They were often common law judges who sat as commissioners for the trial of crimes within the admiralty and maritime jurisdiction. Holdsworth, History of English Law, 3d ed., Vol. I., 550-552; Hale, Pleas of the Crown, Vol. II, 17; Stephen, History of Criminal Law of England, Vol. II, 16-23; cf. Brooks, Trial of Captain Kidd, 40, 57. There is evidence that during the seventeenth century the courts of Virginia and Maryland tried felonies and piracies which, in England, would have been within the jurisdiction of the Admiralty Commissioners. See Crump, Colonial Admiralty Jurisdiction in the Seventeenth Century, 68. The practice under the statute, 28 Henry VIII, c. 15, was extended to the Colonies in cases of "piracy, felonies and robberies", by statute 11 and 12 William III, c. 7. See 2 Stephen, *supra*, 20. In Virginia, very shortly before the enactment of this statute, an act was passed adopting the provisions of the statute of Henry VIII. 3 Hening, Statutes at Large of Virginia, 176. For instances of minor offenses

courts have consistently held that jurisdiction is not restricted to vessels within the navigable waters of the realm, but follows its ships upon the high seas and into ports and rivers within the territorial jurisdiction of foreign sovereigns. *Queen* v. *Carr & Wilson,* 10 Q. B. D. 76; *Queen* v. *Anderson,* L. R., 1 Crown Cases Reserved 161; *Rex* v. *Allen,* 1 Moody C. C. 494; see *Rex* v. *Jemot,* 1 Russell on Crimes, 4th ed. 153.

The criminal jurisdiction of the United States is wholly statutory, see *United States* v. *Hudson,* 7 Cranch. 32, but it has never been doubted that the grant of admiralty and maritime jurisdiction to the federal government includes the legislative power to define and punish crimes committed upon vessels lying in navigable waters of the United States. From the very organization of the government, and without intermission, Congress has also asserted the power, analogous to that exercised by English courts of admiralty, to punish crimes committed on vessels of the United States while on the high seas or on navigable waters not within the territorial jurisdiction of a state. The Act of April 30, 1790, c. 9, § 8, 1 Stat. 112, 113, provided for the punishment of murder committed "upon the high seas or in any river, haven, basin or bay out of the jurisdiction of any particular state", and provided for the trial of the offender in the district where he might be apprehended or "into which he may first be brought". § 12 of this Act dealt with manslaughter, but only when committed upon the high seas. It is

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prosecuted in the Colonial Courts of Vice-Admiralty in the eighteenth century, see Hough's Cases in Vice-Admiralty and Admiralty: King *v.* Booth (1730), p. 12; King *v.* Burgess (1748), p. 56; King *v.* White (1754), p. 81. Eighteenth century Vice-Admiralty commissions in the Colonies contain verbal grants of jurisdiction over crimes within the admiralty jurisdiction. Publications of Colonial Society of Massachusetts, vol. II, 237, 238; Benedict on Admiralty, 5th Ed., 787-811; Record Book of Maryland Court of Vice-Admiralty in Manuscripts Division of the Library of Congress, fols. 74, 82. And there is evidence of the trial of piracies in the Colonies, see Jameson, Privateering and Piracy in the Colonial Period, pp. 143, 278, note 1, 286, note 1; and see 577 to 580. Compare Rhode Island: Letters from Governors in America, 1756, P.R.O.: C.O.5.: 17, p. 639 (Ms. copy in Library of Congress), which indicates a trial at Providence for murder on the high seas in a special admiralty court constituted under the statute 11 and 12 William III. Captain Kidd, who was arrested in Boston prior to 1700 for murder and piracy on the high seas, was transported to England for trial before an admiralty court organized pursuant to royal commission (see 14 Howell's State Trials, 123, 147, 191) and this practice may well have continued after the statute of William III.

true that in *United States* v. *Bevans,* 3 Wheat. 336, the prisoner, charged with murder on a warship in Boston Harbor, was discharged, as was one charged with manslaughter committed on a vessel on a Chinese River in *United States* v. *Wiltberger,* 5 Wheat. 76. But the judgments were based not upon a want of power in Congress to define and punish the crimes charged, but upon the ground that the statute did not apply, in the one case, for the reason that the place of the offense was not out of the jurisdiction of a state, and in the other, because the offense, manslaughter, was not committed on the high seas.[6]

The Act of March 3, 1825, c. 65, § 4, 4 Stat. 115, provided for the punishment of any person committing murder "upon the high seas or in any arm of the sea or in any river, haven, creek, basin or bay, within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state", and § 22 provided for the punishment of assault with a dangerous weapon, committed under similar circumstances.[7] The provisions of the latter section, carried into § 5346 of the Revised Statutes, were upheld in *United States* v. *Rodgers, supra,* as a constitutional exercise of the power of Congress to define and punish offenses occurring in American vessels while within territorial waters of

[6]In United States *v.* McGill, 4 Dall. 425, Mr. Justice Washington, sitting in the Circuit Court in a case where the offense charged was murder committed on a vessel lying in the haven of Cape Francois, held that the statute did not apply where the mortal stroke was given on the vessel, but the death occurred on shore, since the murder was not committed on the high seas or any river, basin or bay. He doubted whether the offense thus committed was cognizable in admiralty in the absence of statute, but stated he had no doubt of the power of Congress to provide for it.

[7]By §5, the provisions of the act of 1825 were specifically made applicable to any offense "committed on board of any ship or vessel, belonging to any citizen or citizens of the United States, while lying in a port or place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of said ship, or any passenger, on any other person belonging to the company of said ship, or any other passenger . . .". This language was not, in terms, incorporated in the Revised Statutes.

Daniel Webster, Chairman of the House Committee having in charge the bill which became the Act of 1825, pointed out in introducing it that the offenses for which it provided punishment had actually occurred upon our ships, while lying in the harbors of foreign nations and had gone unpunished for want of such legislation. Gall & Seaton's Register of Debates in Congress, Vol. 1, cols. 154, 158.

another sovereignty. Rodgers had been convicted of assault with a dangerous weapon, committed on a vessel of the United States lying in the Detroit River within the territorial jurisdiction of Canada, and his conviction was sustained by this Court. It was assumed that the statute was applicable only with respect to offenses committed on the high seas and waters tributary to them, and the decision turned on whether the Great Lakes were to be deemed "high seas" within the meaning of the statute. It was held that they were, and the power of Congress to punish offenses committed on an American vessel within the territorial waters of Canada, tributary to the Lakes, was expressly affirmed.

As the offense charged here appears to have been committed on an American vessel while discharging cargo in port, the jurisdiction is not affected by the fact that she was then at a point on the Congo remote from the sea, where it does not affirmatively appear that the water is salt or tidal. On this point also *United States* v. *Rodgers, supra,* is controlling, for there the offense committed within a foreign territorial jurisdiction was upon non-tidal fresh water.[8]

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[8]That the jurisdiction in admiralty "extends as far as the tide ebbs and flows" was a convenient definition of its limits in the historic controversy over the conflicting claims of jurisdiction of the English courts of common law and admiralty over waters within the realm (see DeLovio *v.* Boit, 7 Fed. Cas. 418, 428; compare Waring *v.* Clark, 5 How. 441, 453; United States *v.* Coombs, 12 Pet. 72; Manchester *v.* Massachusetts, 139 U. S. 240), a conflict which was but an aspect of the struggle for supremacy of the common law and the prerogative courts. Cf. Julius Goebel, Cases and Materials on the Development of Legal Institutions (1931), 225. But it is a very different question whether the traditional jurisdiction of admiralty conferred upon the United States by the Constitution, extends to non-tidal waters. In England public navigable waters are tidal, and with respect to them the terms have been used interchangeably. But there is nothing in the nature of maritime transactions or the maritime law, which is concerned with the affairs of vessels and those who sail, own, use or injure them, which need limit its application to tidal waters. See Benedict on Admiralty, 5th Ed., §§ 39, 43. This was recognized and acted upon by the Vice-Admiralty Courts in the Colonies. See Waring *v.* Clark, *supra,* 454, 455, 456. In Queen *v.* Anderson, L. R. 1 Crown Cases Reserved 161, Mr. Justice Blackburn, in upholding the admiralty jurisdiction over manslaughter committed on a British ship forty-five miles up the River Garronne, said, p. 169, that "the jurisdiction of the Admiralty extends over vessels, not only when they are on the open sea, but also when in places where great ships do generally go". And in Rex *v.* Allen, 1 Moody C. C. 494, the judges of England upheld the ad-

The appellee insists that even though Congress has power to define and punish crimes on American vessels in foreign waters, it has not done so by the present statute, since the criminal jurisdiction of the United States is based upon the territorial principle and the statute cannot rightly be interpreted to be a departure from that principle. But the language of the statute making it applicable to offenses committed on an American vessel outside the jurisdiction of a state "within the admiralty and maritime jurisdiction of the United States" is broad enough to include crimes in the territorial waters of a foreign sovereignty. For Congress, by incorporating in the statute the very language of the constitutional grant of power, has made its exercise of the power co-extensive with the grant. Compare *The Hine* v. *Trevor*, 4 Wall. 555.

It is true that the criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extra-territorial effect. *United States* v. *Bowman*, 260 U. S. 94, 98; compare *Blackmer* v. *United States*, 284 U. S. 421. But that principle has never been thought to be applicable to a merchant vessel which, for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, is deemed to be a part of the territory of that sovereignty, and not to lose that character when in navigable waters within the territorial limits of another sovereignty. *United States* v. *Rodgers*, *supra*; compare *Thomas* v. *Lane*, 2 Sumner 1; *Queen* v. *Anderson*, *supra*; *Queen* v. *Carr & Wilson*, *supra*; *Rex* v. *Allen*, *supra*; *Rex* v. *Jemot*, *supra*. This qualification of the territorial principle in the case of vessels of the flag was urged by Mr. Webster while Secretary

miralty jurisdiction of the crime of larceny committed on a British vessel on a Chinese river, twenty or thirty miles from the sea, although it did not appear that the water was tidal. Following the decision in The Genesee Chief, 12 How. 443, that there was constitutional power in Congress to extend the admiralty jurisdiction to non-tidal waters of the United States navigable in fact, civil jurisdiction of admiralty over a collision occurring in the non-tidal waters of the Detroit River within the terrtorial jurisdicton of Canada, was sustained in The Eagle, 8 Wall. 15, and a like jurisdiction over a crime defined and punished by Act of Congress was sustained in United States *v.* Rodgers, 150 U. S. 249. See also The Magnolia, 20 How. 296; The Hine *v.* Trevor, 4 Wall. 555; and In re Garnett, 141 U. S. 1, 17, 18, where Mr. Justice Bradley said, p. 18, that "we have no hesitation in saying that the Savannah River from its mouth to the highest point to which it is navigable is subject to the maritime law and the admiralty jurisdiction of the United States".

of State, in his letter to Lord Ashburton[9] of August 1, 1842, quoted with approval in *United States* v. *Rodgers, supra,* 264, 265. Subject to the right of the territorial sovereignty to assert jurisdiction over offenses disturbing the peace of the port, it has been supported by writers on international law, and has been recognized by France, Belgium, and other continental countries, as well as by England and the United States. See Moore, International Law Digest, Vol. 2, 287, 297; Fiore, International Law Codified, translated by E. M. Borchard, 192, 193; Wheaton, International Law, Vol. I, 245; Hall, International Law, 8th Ed. 253-258; Jessup, The Law of Territorial Waters, 144-193.

In view of the wide recognition of this principle of extra-territorial jurisdiction over crimes committed on merchant vessels and its explicit adoption in *United States* v. *Rodgers, supra,* we cannot say that the language of the present statute punishing offenses

[9] "It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the State retains its jurisdiction over them; and, according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion. This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practice of modern nations. If a murder be committed on board of an American vessel by one of the crew upon another or upon a passenger, or by a passenger on one of the crew or another passenger, while such vessel is lying in a port within the jurisdiction of a foreign State or sovereignty, the offense is cognizable and punishable by the proper court of the United States in the same manner as if such offence had been committed on board the vessel on the high seas. The law of England is supposed to be the same. It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must, doubtless, be answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself." 6 Webster's Works, 306, 307.

on United States vessels out of the jurisdiction of a state, "when committed within the admiralty and maritime jurisdiction of the United States," was not intended to give effect to it. If the meaning of the statute were doubtful, the doubt would be resolved by the report on these sections by the Special Joint Committee on the Revision of the Laws, 60th Congress, 1st Sess., Rep. 10, part 1, p. 10, in which it was pointed out that the jurisdiction extends to vessels of the United States when on navigable waters within the limits of a foreign state, and "all cases arising on board such vessels while on any such waters, are clearly cases within the admiralty and maritime jurisdiction of the United States."

A related but different question, not presented here, may arise when jurisdiction over an offense committed on a foreign vessel is asserted by the sovereignty in whose waters it was lying at the time of its commission, since for some purposes, the jurisdiction may be regarded as concurrent, in that the courts of either sovereignty may try the offense.

There is not entire agreement among nations or the writers on international law as to which sovereignty should yield to the other when the jurisdiction is asserted by both. See Jessup, the Law of Territorial Waters, 144-193. The position of the United States, exemplified in *Wildenhus's Case*, 120 U. S. 1, has been that at least in the case of major crimes, affecting the peace and tranquillity of the port, the jurisdiction asserted by the sovereignty of the port must prevail over that of the vessel. In that case the Belgian Consul sought release on habeas corpus of *Wildenhus*, a seaman, who was held in a New Jersey jail on a charge of homicide committed on a Belgian vessel lying in New Jersey waters, on the ground that Article XI of the Convention between Belgium and the United States of March 9, 1880, 21 Stat. 781, gave consular officers of the sovereignty of the vessel sole cognizance of offenses on board ship, except those of a nature to disturb the tranquillity and public order on shore and those involving a person not belonging to the crew. The court construed the Convention as inapplicable to the crime of murder and upheld the jurisdiction of the local court as conforming to the principles of international law. It said, p. 12:

"And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her,

and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority."

This doctrine does not impinge on that laid down in *United States* v. *Rodgers, supra,* that the United States may define and punish offenses committed by its own citizens on its own vessels while within foreign waters where the local sovereign has not asserted its jurisdiction.[10] In the absence of any controlling treaty provision, and any assertion of jurisdiction by the territorial sovereign, it is the duty of the courts of the United States to apply to offenses committed by its citizens on vessels flying its flag, its own statutes, interpreted in the light of recognized principles of international law. So applied the indictment here sufficiently charges an offense within the admiralty and maritime jurisdiction of the United States and the judgment below must be

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[10]That the doctrines are not in conflict was pointed out by Webster in his letter to Lord Ashburton, quoted *supra* note 9. See also Hall, International Law, 8th ed., 255-256.